# INTERNATIONAL LAWYERS NETWORK


## SEXUAL HARASSMENT IN THE WORKPLACE

**ILN LABOR & EMPLOYMENT GROUP**

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The information in this guide may be considered legal advertising.

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## What constitutes sexual harassment?

Sexual harassment is conduct of a sexual nature, a sexual advance or a request for sexual favours that is unwelcome, where a reasonable person having regard to all the circumstances would have anticipated the person harassed would be offended, humiliated or intimidated.

## What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is governed by both Federal and State/Territory laws.

At a Federal level:

- The *Sex Discrimination Act 1984* is the primary source of sexual harassment law in Australia. It defines sexual harassment and makes it unlawful in the context of employment, membership and professional organisations, clubs, education, provision of goods, services and accommodation, and Commonwealth laws or programs. The Australian Human Rights Commission deals with claims made under this Act.
- The *Fair Work Act 2009* prohibits workplace bullying, defined as repeated unreasonable behaviour towards a worker which creates a risk to health and safety. Repeated sexual harassment can constitute bullying. The Fair Work Commission deals with bullying claims (plus bullying-related victimisation or constructive dismissal claims).

At a State/Territory level:

- State and Territory Equal Opportunity laws also govern sexual harassment. For example, the Victorian *Equal Opportunity Act 2010* makes sexual harassment unlawful, and complaints under the Act are dealt with by the Victorian Equal Opportunity and Human Rights Commission. Each State/Territory has largely similar schemes.
- State and Territory work health and safety laws can apply where sexual harassment results in a physical or psychological injury. Victims can seek compensation for their injury where certain injury thresholds are met, and negligence can be established.

## What actions constitute sexual harassment?

The types of conduct which constitute sexual harassment in each Australian jurisdiction are largely the same. Unwelcome conduct of a sexual nature which would reasonably be anticipated to offend, humiliate or intimidate can include isolated or repeated incidents of:

- staring or leering;
- unnecessary familiarity, such as deliberately brushing up against you or unwelcome touching;
- suggestive comments, jokes or innuendo;

- insults or taunts of a sexual nature;
- intrusive questions or statements about your private life (including at job interviews);
- displaying posters, magazines or screen savers of a sexual nature;
- sending sexually explicit emails or text messages;
- inappropriate advances on social networking sites;
- accessing sexually explicit internet sites;
- requests for sex or repeated unwanted requests to go out on dates;
- attempts at sexual intercourse or some other overt sexual connection;
- kissing;
- statements of a sexual nature, either verbal or written and either made to a person or in their presence;
- behaviour that may also be considered to be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

Mutual attraction, flirtation, friendship or relationships which are welcome do not constitute sexual harassment.

### Can sexual harassment occur between two members of the same sex?

Yes. There is no requirement that the harasser and the person harassed be of different sexes or genders.

### Are employers required to provide sexual harassment training for their employees?

There is no legal requirement to provide sexual harassment training, nor for an employer's sexual harassment policy to be legally binding. However, not doing so may render an employer vicariously liable for sexual harassment committed by its employees or agents.

### What are the liabilities and damages for sexual harassment and where do they fall?

A perpetrator may be civilly liable; and may also be criminally liable if their conduct constitutes a criminal offence such as stalking or sexual assault. An employer may validly dismiss a perpetrator due to their sexual harassment, but procedural fairness must be afforded to avoid unfair dismissal claims against the employer.

Employers, prospective employers and contracting agencies can be held liable for:

- Sexual harassment by employees or agents; including where harassment occurs outside of the workplace but "in connection with a person's employment" - for example, at employer-sponsored events, work-related social functions or business trips.
- Failing to provide a safe working environment under the various State/Territory work health and safety Acts. Cases under this regime usually involve a serious psychological injury caused by the

harassment, and there is a continuing trend of awarding high damages for pain, suffering and loss of enjoyment of life.

- Not properly investigating a sexual harassment complaint, including by victimising or taking adverse action against the complainant, failing to abide by their policies, or not affording the parties procedural fairness.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The onus is on the person harassed to prove that the conduct occurred; was of a sexual nature; was unwelcome; and was such that a reasonable person, having regard to all the circumstances, would have anticipated the possibility the conduct would offend, humiliate and/or intimidate.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The same laws apply regardless of who the perpetrator is. However, an employer is able to be held vicariously liable for harassment committed by supervisors or co-workers.

### What are the potential defences employers have against sexual harassment claims?

An employer will escape vicarious liability under the *Sex Discrimination Act* where it took "**all reasonable steps**" to prevent sexual harassment. Merely having a sexual harassment policy is insufficient: an employer should implement the policy, train its employees on how to identify and deal with sexual harassment, and take appropriate action to handle instances of sexual harassment to demonstrate all reasonable steps were taken. Whether steps were "reasonable" will depend on the nature of the employer - for example, small businesses may not be held to the same standard as large companies.

An employer may also be able to argue in claims brought under the *Fair Work Act* that the harassment was **not in connection with employment**, and therefore the employer is not vicariously liable. Harassment occurring outside of work must have a sufficient connection with employment for an employer to be liable. For instance, conduct occurring while a manager is at an employee's house for a social occasion is unlikely to be in connection with employment; but the same conduct during a work-sponsored business trip would likely be connected with employment.

### Who qualifies as a supervisor?

Regardless of the role title of the person who harasses an employee in the workplace or in connection with work, that person will be held liable. There is a broad concept of the harasser in Australian legislation, and the law does not treat supervisors any differently. However, the various Commissions may look less favourably on a sexual harassment claim against a senior or supervisory employee, for example by awarding higher damages.

Furthermore, the *Sex Discrimination Act* requires the relationship between the two persons to be taken into account when determining if conduct was harassment. This may include taking into account their power dynamic, hierarchy or working relationship.

### How can employers protect themselves from sexual harassment claims?

The most important protection is to take "all reasonable steps" to prevent sexual harassment in the workplace. The best way of so doing is to put in place a comprehensive sexual harassment policy, train employees in that policy, state that the employer will not tolerate sexual harassment, and discipline or terminate those who breach the policy.

### Does sexual harassment cover harassment because of pregnancy?

Pregnancy-based complaints more commonly fall under anti-discrimination law. However, it is possible for sexual harassment to occur in the context of pregnancy. Such claims would proceed the same way as any other sexual harassment claim.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. The law does not distinguish as to who is protected based on sexual orientation or gender identity.

### What is prohibited retaliation?

The *Sex Discrimination Act* prohibits "**victimisation**": where a person subjects, or threatens to subject, the person harassed to any detriment because they have lodged or propose to lodge a complaint with the Australian Human Rights Commission. A defence is available if the allegation is proved to be false and not made in good faith. State/Territory equal opportunity laws contain similar provisions.

Further, the *Fair Work Act* prohibits "**adverse action**" against an employee because they have made a complaint or claim about sexual harassment to the Fair Work Commission. Adverse action includes dismissing the employee, discriminating against them, or otherwise altering the employee's position to their detriment. If an employer does take or threaten to take adverse action, a person can bring a claim under the "general protections" provisions of the Fair Work Commission, and potentially be reinstated or compensated.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

Conduct is only sexual harassment where it is unwelcome. Consensual, welcome relationships - even between a supervisor and their subordinate - are unlikely of themselves to constitute sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. Employers can be vicariously liable for the actions of agents. Agents include people who work on the same premises but have a different employer, contractors, partners, and representatives of the employer or trade unions. For example, if John – a cleaner at the cleaning company which is contracted to clean your office – sexually harasses your employee Sarah while he is at your office, you as the employer can be held vicariously liable if you have not taken reasonable steps to prevent harassment.

### What is the #MeToo movement?

The #MeToo movement is a social, cultural and political women's rights movement centred on sexual harassment and assault. As in many other countries, the #MeToo movement in Australia continues to impact the professional world. There has been a marked increase in seminars, training sessions, media

coverage and awareness of rights and responsibilities under sexual harassment laws. Hall & Wilcox has experienced an increase in employers seeking up to date advice on their obligations, and also continues to witness the trend of increasing damages for victims' compensation for pain, suffering & loss of enjoyment of life.

### How is the #MeToo movement impacting the law in your jurisdiction?

Although no laws have yet been changed as a direct result of #MeToo, several law reform topics are receiving attention in the mainstream media. These include: reform to defamation laws to enable victims to more easily "name and shame" their perpetrator, increasing the time limit to lodge complaints with the Australian Human Rights Commission, reviewing the 30-year-old *Sex Discrimination Act,* creating a process for urgent interventions to stop harassment, special protections for sexual harassment whistleblowers and much more. Of particular relevance is the debate around streamlining Australian sexual harassment laws – including the *Fair Work Act* and *Sex Discrimination Act* – to ensure accessibility, efficiency and clarity for both victims and employers.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT COLOMBIAN COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

In Colombia there is no specific regulation from a labor law perspective that defines which acts and/or behaviors could imply sexual harassment. However, Colombia, as part of ILO (International Labor Organization), has been using the definition that this organization provided in the following terms:

*"a sex-based behavior that is unwelcome and offensive to its recipient. For sexual harassment to exist these two conditions must be present."*[1]

ILO has also indicated that sexual harassment may take two forms:

1) Quid Pro Quo: when a job benefit, such as a pay rise, a promotion, or even continued employment, is made conditional on the victim complying to demands to engage in some form of sexual behavior.

2) Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim[2].

## What body of law governs sexual harassment in your jurisdiction?

- Article 210A of the Colombian Criminal Code typifies sexual harassment as a crime.
- Law 1010 of 2006 regulates the measures to prevent, correct and punish labor harassment and other behaviors within the framework of employment relationships. This provision however, only mentions briefly sexual harassment as a category of labor harassment, but it does not indicate specifically which acts and/or behaviors could imply sexual harassment.
- Recent judgments from the Colombian Supreme Court of Justice about this topic which indicate actions and behaviors that constitute sexual harassment at work.
- ILO guidelines.

## What actions constitute sexual harassment?

Sexual harassment implies a wide range of actions that could range from suggestive comments about appearance or how some dresses, to physical abuse. According with ILO, the following behaviors qualifies as sexual harassment:

- PHYSICAL: Physical violence, touching, unnecessary close proximity.

[1] Declaration on Fundamental Principles and Rights at Work. Sexual Harassment at Work Fact Sheet. ILO. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf.
[2] Ibid.

- VERBAL: Comments and questions about appearance, life-style, sexual orientation, offensive phone calls.
- NON-VERBAL: Whistling, sexually-suggestive gestures, display of sexual materials[3].

### Can sexual harassment occur between two members of the same sex?

Yes. Judgment No. SP107-2018 from the Colombian Supreme Court of Justice established that sexual harassment is a crime that could be committed against any person, regardless gender o sexual orientation.

### Are employers required to provide sexual harassment training for their employees?

There is no obligation from the employers to provide sexual harassment training to employees in Colombia. However, and according with Law 1010 of 2006, companies are obligated to create a Connivance Labor Committee who is in charge of receiving and attending the possible mobbing complaints and present recommendations to the manager, like conferences or trainings to the employees in order to prevent and correct behaviors of labor harassment.

### What are the liabilities and damages for sexual harassment and where do they fall?

There are two different scenarios in which damages and penalties for sexual harassment can occur:

Criminal Law: A person found guilty for acts of sexual harassment could be condemned to one (1) to three (3) years of imprisonment. Once the judgement is made, the victim may be entitled for compensatory damages.

Labor Law: A company is entitled to terminate the labor contract with fair cause to the employee that is committing acts of sexual harassment. The victim could also present a claim before the Labor Ministry. This entity could impose fines to the aggressor and even to the employer if it is proved that the company tolerated this behavior.

Finally, and for the victim that had to quit or was fired because of sexual harassment, it will be entitled to the indemnification payment for the termination of the labor contract without fair cause.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The first step to follow when employees believe that they have been sexually harassed is to present a complaint with the respective evidence before Human Resources and/or the Connivance Labor Committee. The company has the obligation to investigate and define the action plan in order to correct and punish sexual harassment at the workplace. If the company tolerates the behavior or fails to take prompt remedial action, the employee could present the complaint directly before the Labor Ministry or a Labor Judge.

[3] Ibid.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Yes, pursuant Article 4 of Law 1010 of 2006, the predominant position that the aggressor has in society, like position, economic status, power or dignity, is an aggravating circumstance in order to correct and punish sexual harassment at the workplace.

### What are the potential defenses employers have against sexual harassment claims?

The potential defenses employers have against sexual harassment claims are the following:

- Appropriate operation of the Connivance Labor Committee within the company.
- The Connivance Labor Committee exercised reasonable care to prevent and correct promptly any harassing behavior according with the proceeding stablish in Law 1010 of 2006.
- The employee did not present any complaint before the Connivance Labor Committee and/or Human Resources. In that way it was impossible for the employer to have knowledge of the situation.
- The employee did not pay attention to any preventive or corrective measures provided by the Connivance Labor Committee.
- The complaint submitted by the employee has no reasonable or factual basis. In this case, the Labor Judge could impose fines to the employee.

### Who qualifies as a supervisor?

Pursuant Law 1010 of 2006, individuals who work as managers, heads, director or other in position and direction in a company or organization, can be active subjects or authors of labor harassment.

### How can employers protect themselves from sexual harassment claims?

Employers must create and ensure the appropriate operation of the Connivance Labor Committee. This Committee should implement accessible complaint procedures for employees in order to report sexual harassment behaviors. Employers should have a sexual harassment policy and schedule talks and conferences for the employees to be aware of this type of harassment at the workplace.

### Does sexual harassment cover harassment because of pregnancy?

No, this type of behavior is forbidden, and it is regulated in other Colombian Labor provisions as well as several rulings of the Constitutional Court and of the Supreme Court of Justice.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

As explained in answer No. 4, sexual harassment does not differentiate gender or sexual orientation. However, if the behaviors against the victim are based on discrimination criteria rather than sexual harassment acts, the employee could submit a complaint to the Labor Connivance Labor Committee arguing labor discrimination which is another type of harassment at the workplace.

### What is prohibited retaliation?

Article 11 of Law 1010 of 2006 establish special protection measures in order to prevent retaliation actions against an employee for reporting an incident of sexual or any other type of labor harassment or for participating in an investigation of a harassment complaint.

The first measure is the lack of effect of the employer's decision to terminate the labor contract of the victim who had submitted a complaint. This protection will be effective within the following six (6) months after the complaint has been filed, as long as the competent administrative, judicial or control authority verifies the reported situation.

There are other measures for public officials and employees who render services for State entities.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not considered as sexual harassment. However, internal working rulings usually indicate the obligation to report this kind of relationships in order to prevent a possible conflict of interests.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

No. The employer will be only liable for actions or omissions of persons under its responsibility and care.

### What is the #MeToo movement?

The MeToo movement was founded in 2006 in the United States as an initiative to help and support victims of sexual violence. It was initially focused on young women of color with low resources.

This movement went viral from October 2017 when some Hollywood actresses started to use the hashtag #Metoo in order to make public in social media cases of sexual harassment committed by the movie producer Harvey Weinstein.

The goal of this huge movement is to tell the victims they are not alone and encourage them to take action against their perpetrators.

### How is the #MeToo movement impacting the law in your jurisdiction?

In Colombia, the #MeToo movement has not had an impact at the same level as in the United States, but in any case, sexual harassment has begun to be questioned publicly, mostly by women, whose voices have been started to be heard by the government.

It is important to mention that in 2008 Colombia issued a law intended to protect women, but in our opinion, it has not had the expected impact.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CYPRIOT COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

Sexual harassment is any undesirable conduct of a sexual nature, expressed either by words or deeds, which has the purpose or effect of violating the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment, during the person's employment or vocational training or during the person's access to employment or vocational training. Harassment can be any undesirable conduct associated with a person's sex, which has the purpose or effect of violating the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment.

## What body of law governs sexual harassment in your jurisdiction?

Section 12 of the Equal Treatment for Men and Women in Employment and Vocation Training Law (205(I)/2002) (herein after "**the Law**") strictly prohibits any actions or omissions, either of a legal entity or a natural person, which is either recurring or non-recurring, which constitute sexual harassment.

## What actions constitute sexual harassment?

Sexual harassment can take many forms, including:

- Engaging in unwelcome sexual conduct towards an individual, including offensive comments, touching or sexual propositions.
- Conditioning a performance evaluation, promotion, salary increase, vacation or other job benefit on an individual's submission to sexual demands.
- Repetition of jokes or other remarks with sexual content.
- Taking or failing to take personnel action as a reprisal against any individual for rejecting sexual advances.
- Repeated references to a person's body, face, sexual preferences, sexual performance.
- Display of objects, posters, cartoons or pictures of a sexual nature.
- Displaying, sending, forwarding, downloading or otherwise distributing sexual materials via Internet, computer or e-mail.

## Can sexual harassment occur between two members of the same sex?

Yes, as the Law prohibits any actions which constitute harassment or sexual harassment, if the harassment is based on sex.

### Are employers required to provide sexual harassment training for their employees?

Employers are not required by Law to provide training for their employees in matters relating to sexual harassment, although it is considered a good practice.

### What are the liabilities and damages for sexual harassment and where do they fall?

Anyone who has been in breach of the Law in matters relating to sexual harassment can bear both civil and criminal liability.

In Civil procedures, the Employment Tribunal Court will award damages on the basis that it is just and reasonable to do so and the damages awarded will cover all the damage suffered by the applicant as a result of the violation of the Law by the respondent. The damages cover material damages, physical and moral damages.

In Criminal procedures, if the perpetrator is a natural person then he will face a fine or a penalty of up to 6 months imprisonment or both and in cases where the perpetrator is a legal entity will face a fine up to €10.570.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must show that the actions were (1) unwelcomed by him or her; (2) of a sexual nature and (3) of such nature, form and intensity which can reasonably violate the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment for the person who is being sexually harassed according to a first instance case (*NEKTARIAS VERESIE v. MICHALIS MICHAEL and another, Application No. 556/11. 20/12/2017*).

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Current legislation does not provide a distinction between supervisors and co-workers in matters relating to sexual harassment. The Law strictly prohibits any actions which can constitute sexual harassment and the only distinction made is between a natural and a legal person. However, in case the offence is committed by a co-worker, the supervisor can be deemed to be jointly liable provided they did not take all adequate measures to prevent it.

### What are the potential defenses employers have against sexual harassment claims?

The law imposes an obligation on the employer to take active measures in protecting their employees from any actions or omissions that constitute sexual harassment. This can be done by issuing a Sexual Harassment Policy informing their employees about sexual harassment and the measures that must be taken to prevent such behavior from happening. Moreover, the employer, as soon as he becomes aware of any sexual harassment taking place in the workplace, must take all reasonable steps and corrective measures to stop any harassing behaviour from re-occurring.

If the employer takes all the above measures and he/she can prove that all the said measures were taken adequately, then it can potentially be used as a defence against sexual harassment claims, provided that the employer was not the perpetrator.

### Who qualifies as a supervisor?

Although the Law does not provide a definition for a supervisor, it can be said that a supervisor, in cases involving harassment claims, is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed.

### How can employers protect themselves from sexual harassment claims?

Employers should devise and provide all employees with a copy of a sexual harassment policy and implement accessible complaint procedures for employees who believe they are being subject to or witness sexual harassment and take all the necessary and reasonable steps in dealing with such claims as soon as they become aware of them.

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under the Equal Treatment for Men and Women in Employment and Vocation Training Law.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The Law strictly prohibits sexual harassment claims which are based solely on sex and makes no reference or distinction in relation to sexual orientation and/or gender identity. However, if a person who is gay, lesbian, bi-sexual or transgender is being harassed due to his/her sex then this action is prohibited under the Law, irrespective of their sexual orientation and/or gender identity.

### What is prohibited retaliation?

Employers may not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. A claim for retaliation may be made even if the underlying complaint of harassment is unfounded.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

The Law defines sexual harassment as “any unwelcome by the recipient behavior of a sexual nature”.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

The Law does not confer such liability on an employer.

### What is the #MeToo movement?

Although the #MeToo movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especial workplace misconduct, to step forward and take action against their perpetrators in countries worldwide and especially in the United States of America, such movement has yet to been founded in Cyprus and to this day there is no movement battling sexual harassment.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CZECH COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

In the sense of Czech law, *sexual harassment* is a special type of harassment as a general term.

Act No. 198/2009 Coll., on Equal Treatment and Legal Protection Against Discrimination (the Anti-Discrimination Act) defines *sexual harassment* as any unwanted conduct of a sexual nature (i) taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment, or (ii) which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

## What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is namely the subject of civil law. Some definitions and general questions are governed by the Anti-Discrimination Act. Questions particularly related to labour law are further regulated by Act No. 262/2006 Coll., the Labour Code.

## What actions constitute sexual harassment?

Pursuant to the Anti-Discrimination Act: Sexual harassment can take many forms, including:

- Unwanted conduct of a sexual nature,
    - taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment, or
    - which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

Examples of such conduct include:

- Repeated long-term aggressive, sexually-coloured remarks that are obviously unwanted by one person;
- Various non-verbal acts (such as pictures of nude women on walls in a predominantly male environment which may create a threatening atmosphere to colleagues in the same workplace);
- Repeated sending of jokes and images with a sexual subtext over the internet against the addressee's will;
- Unpleasant verbal sexual expression, offers, allusions;
- Physical contact (excessive hair stroking, attacks, etc.);
- Enforcing sexual contact, sexual extortion, in extreme cases even rape.

However, relationships at the workplace are not examples of sexual harassment. Sexual harassment has to be undesirable. Not even flirting is considered sexual harassment, provided that it is accepted by the other party. If flirting is not accepted, it has to be stopped immediately. It always depends on the actual circumstances.

### Can sexual harassment occur between two members of the same sex?

Yes.

### Are employers required to provide sexual harassment training for their employees?

Pursuant to the Czech Labour Code, employers are obliged to inform employees on measures whereby the employer ensures equal treatment of male and female employees and prevents discrimination. In consequence, employers have to prepare mechanisms that ensure equal treatment and the protection of their employees from sexual harassment. However, each employer ensures the equal treatment individually and there are no general rules on how to proceed provided by law.

### What are the liabilities and damages for sexual harassment and where do they fall?

Pursuant to the Labour Code, employers are obliged to ensure equal treatment and non-discrimination. If the employer fails to ensure such conditions, it may be fined up to CZK 1 million (i.e., circa EUR 40,000).

In the event of a violation of the rights and obligations following from the right to equal treatment or discrimination, the affected person has the right to claim before the courts, in particular, that the discrimination be refrained from, that the consequences of the discriminatory act be remedied and that (s)he be provided with appropriate compensation. If the remedy is not sufficient, the harmed person also has the right to monetary compensation for non-material damage.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must show that he or she was subject to unwelcome sexual harassment.

If the court deduces the discriminatory behaviour of the defendant, the court will transfer the burden of proof to the Employer pursuant to the Code of Civil Procedure. This means that the defendant (Employer) will be required to prove that there has been no discriminatory conduct on its part and, if so that it was in compliance with the law.

In the event that the sexual harassment has a more serious form, it can be considered a criminal offence committed by the harassing person and shall be investigated by the police. In such cases, the harassment must fulfil the features of particular criminal offences such as extortion, restriction of personal freedom or even rape. In the case of a criminal offence, it is the harassing person who shall be sued (such law suit does not exclude potential claim for parallel responsibility of the Employer).

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Czech law does not expressly distinguish between sexual harassment from a supervisor or a co-worker. However, it is more likely to fulfil the condition of unwanted action "which could be legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationship" when made by a supervisor.

### What are the potential defenses employers have against sexual harassment claims?

The employer has the obligation to ensure protection against sexual harassment. Thus, if the employer proves that it took all of the measures necessary to avoid sexual harassment, it cannot be found liable or can at least limit its responsibility.

### Who qualifies as a supervisor?

The Czech Labour Code defines a supervisor (or managerial employee) as those employees who are authorized, at the individual management levels, to determine and impose working tasks on subordinate employees, organize, direct and control their work and give them binding instructions to this end. The head of an organizational unit of the State is or is also deemed to be a managerial employee.

However, Czech labour law, and Czech labour law case law, do not distinguish between a supervisor and a regular co-worker for the purposes of sexual harassment.

### How can employers protect themselves from sexual harassment claims?

An employer needs to have internal measures to avoid sexual harassment and should inform its employees about such measures and ensure they are followed.

### Does sexual harassment cover harassment because of pregnancy?

Pregnancy might be a reason for discrimination under Czech law. Harassment because of pregnancy, however, is not directly considered as sexual harassment.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. Czech law does not differentiate in regard to sexual orientation.

### What is prohibited retaliation?

Czech law does not foresee any possibility for the employer to take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. Further, it is considered an offence if an employer affects or disadvantages an employee because he/she lawfully asserted his/her rights and claims arising from labour law relations, or if the employer did not negotiate upon the employee's request a complaint concerning rights and obligations arising from the employment relationship (including any claimed sexual harassment).

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not prohibited by Czech law. However, if there is any doubt, such relation is more likely to be "legitimately perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships" which might fulfill the features of sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Generally, no. However, the employer is always obliged to ensure measures to avoid sexual harassment. Thus, we cannot exclude that an employer would be held liable or co-liable for actions of third parties who are in business contact with its employees if it has not taken necessary and reasonable measures to avoid sexual harassment. To date, there is no case law in such sense.

### What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especially workplace misconduct, to step forward and take action against perpetrators.

### How is the #MeToo movement impacting the law in your jurisdiction?

There is currently no direct impact of the #MeToo movement on Czech law. However, we cannot exclude any future impact following to the spread and development of the #MeToo movement.



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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT ENGLISH COMPANIES NEED TO KNOW

### What constitutes sexual harassment?

In England and Wales, it is unwanted conduct of a sexual nature which has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

The victim also has protection from being treated less favourably because they have rejected or submitted to unwanted conduct of a sexual nature. See the answer to the question about prohibited retaliation below.

Separately there is protection for harassment related to sex (gender) and sexual orientation, gender reassignment as well as other protected characteristics. The scope of this Q&A is to consider sexual harassment as set out above.

### What body of law governs sexual harassment in your jurisdiction?

The Equality Act 2010 applies to most sexual harassment which occurs in the workplace or is related to employment. The Protection From Harassment Act 1997 may also be relevant but is intended to apply where any harassment or conduct occurs generally and not specifically related to work or employment.

### What actions constitute sexual harassment?

See the answer to the first question above. Sexual harassment typically is associated with unwanted conduct or behavior of a sexual nature which violates dignity or creates an intimidating or degrading environment.

A wide range of actions can therefore constitute sexual harassment, but common examples include:

- unwanted physical conduct or "horseplay", including touching, pinching, pushing and grabbing;
- continued suggestions for social activity after it has been made clear that such suggestions are unwelcome;
- sending or displaying material that is pornographic or that some people may find offensive (including e-mails, text messages, video clips and images sent by mobile phone or posted on the internet);
- unwelcome sexual advances or suggestive behaviour (which the harasser may perceive as harmless); and
- jokes of a sexual nature.

### Can sexual harassment occur between two members of the same sex?

Yes. Most complaints regarding harassment involve members of the opposite sex but there is no requirement for this.

### Are employers required to provide sexual harassment training for their employees?

No.

In most cases, employers are vicariously liable for the actions of their employees and so, where sexual harassment occurs at work or is related to work, usually the victim will raise a complaint or pursue a claim against the employer as well as the individual perpetrator.

Having completed sexual harassment training and/or having anti-harassment policies in place will help an employer in defending harassment claims.

### What are the liabilities and damages for sexual harassment and where do they fall?

Damages in England and Wales are typically compensatory rather than punitive. As such, an employee is entitled to recover any financial loss they have suffered as a result of sexual harassment. If the employee has remained in work, there will often be no loss and so limited compensation (see below).

If the employee resigns following an incident of sexual harassment, or the incident involves the termination of their employment, they will suffer a loss of salary. The employee is entitled to pursue compensation for this loss – which will usually be the lost net salary from the date of termination until a time when it can be expected that they will find a new role of equivalent remuneration with a new employer. There is no cap that applies to this compensation and it is not unusual for employees to seek many years' worth of lost salary where they allege sexual harassment.

In addition, employees that have suffered sexual harassment are entitled to seek compensation for "injury to feelings". The compensation to be awarded for injury to feelings falls within three bands:

- an award in the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;
- an award in the middle band should be used for serious cases, which do not merit an award in the highest band; and
- an award in the top band would be made in the most serious cases, such as where there has been a lengthy campaign of harassment. Only in the most exceptional case should an award for injury to feelings exceed the top of this band.

The value of the bands has recently been increased as follows:

- awards in the lower band will be between £900 and £8,600;
- awards in the middle band will be between £8,600 and £25,700; and
- awards in the upper band will be between £25,700 and £42,900.

The employer and any personal defendant will be liable for any compensation awarded on a joint and several basis – meaning that the successful claimant would be entitled to recover 100% of the compensation from any of the respondents. Typically, the employer is the target in this respect as they will be more likely to be able to pay the compensation.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe they have been sexually harassed must show that (1) the perpetrator engaged in unwanted conduct of a sexual nature and that (2) the behaviour had either the purpose or effect of either violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The employee does not need to have made the perpetrator aware that the conduct was unwanted.

When considering what effect the behaviour had, the Employment Tribunal (the courts in England and Wales that hear complaints of sexual harassment in the workplace) will take into account the victim's subjective view. However, the Employment Tribunal will also consider whether it is reasonable for the conduct to have that effect.

A one-off incident is enough to establish sexual harassment. The employee does not need to establish a course of conduct.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

In short, no. For the purposes of the legislation in England and Wales, an employer is usually vicariously liable for the acts of an employee in the course of their employment (subject to the employer establishing a successful defence, as discussed below). The seniority of the employee is not a relevant consideration.

### What are the potential defenses employers have against sexual harassment claims?

An employee who is subject to sexual harassment can bring their claim against the individual perpetrator and/or their employer. An employer will have a defence against a claim for sexual harassment if it can show that it took "all reasonable steps" to prevent the employee from carrying out the offending behaviour or from doing anything of that description.

The employer must have taken these steps before the harassment occurred. Relying on its response to an employee's complaint of sexual harassment will not be enough to successfully defend a claim.

The Employment Tribunal will consider (1) the steps the employer took and (2) other steps it was reasonable for the employer to take, when deciding if the employer is vicariously liable for the acts of its employees.

Therefore, employers should take steps to protect themselves in this respect, which is discussed further below.

### Who qualifies as a supervisor?

Not relevant in England and Wales.

### How can employers protect themselves from sexual harassment claims?

Employers should proactively take steps to prevent behaviours which amount to sexual harassment. These will usually include:

1. having an equal opportunities policy and an anti-harassment and bullying policy;
2. keeping those policies under review and proactively making staff aware of them;
3. training managers in these types of issues, including how to identify them and deal with them;
4. dealing swiftly and effectively with complaints of sexual harassment, making sure the complainant is supported and that the perpetrator is subject to suitable disciplinary action.

The Employment Tribunal have made clear that simply having a policy in place will not be enough to defend claims of sexual harassment. Employers must ensure staff are informed and policies are effectively implemented.

### Does sexual harassment cover harassment because of pregnancy?

No. Pregnancy and maternity are not relevant for the purposes of establishing sexual harassment.

However, employees do benefit from other protections against discrimination on the grounds of pregnancy and maternity.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. Sexual harassment in England and Wales relates to unwanted conduct of a sexual nature and will apply regardless of the sexual orientation of the harasser or the victim.

Harassment related to sexual orientation is also prohibited.

### What is prohibited retaliation?

Retaliation in England and Wales is known as “victimisation”. Employers are prohibited from subjecting someone to a detriment (i.e. disadvantaging them) because they have or intend to (or are suspected of having or intending to):

1. allege sexual harassment has taken place;
2. bring proceedings in relation to sexual harassment; or
3. given evidence/information in relation to a complaint.

Protection does not apply to individuals who have made false statements in bad faith. However, those who have made false statements in good faith will be protected from victimisation.

Additionally, there is protection for victims of sexual harassment from being treated less favourably either because they have rejected or submitted to the sexual harassment. For example, if an employee rejects the sexual advances of her boss and is then turned down for a promotion because of her rejection, she will have been treated less favourably.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

For sexual harassment to be established in England and Wales, the conduct must be unwanted. It must also be established that it was reasonable for the complainant to consider the conduct to have the effect of creating an intimidating, hostile etc. environment. Whilst a complaint of sexual harassment could arise even where there is a consensual relationship, it may be more difficult to establish that the conduct was unwanted or that it was reasonable for the complainant to consider it had such effect.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Potentially, yes. Currently there is uncertainty as to when liability for harassment by third parties will arise. In circumstances where an employer was on notice of the risks of harassment (e.g. where there have been previous complaints about the actions of a client) and has failed to take appropriate action, there is a reasonable prospect that the employer will be found at fault.

In any event, employers can take steps to avoid liability (or harassment occurring in the first place) which would include: having a policy on harassment; notifying third parties that harassment is unlawful and will not be tolerated (for example by displaying a public notice); express terms in contracts with third parties requiring them to adhere to the harassment policy; encouraging employees to report incidents and taking appropriate action to deal with a complaint.

### What is the #MeToo movement?

The #MeToo movement has been used by victims of sexual harassment (both male and female) to support one another and to make it clear to the wider society that such behaviour will not be suffered in silence. It has been widely used on social media and in the wider media for victims of sexual harassment to share their experiences and lend support to others. It has highlighted the prevalence of sexual harassment, particularly in the workplace.

### How is the #MeToo movement impacting the law in your jurisdiction?

Currently there has been no legislative change, however the Equality and Human Rights Commission (**EHRC**) has made a number of recommendations to the UK Government to introduce new laws.

The EHRC issued a report on 27 March 2018 which followed a call for evidence in relation to sexual harassment in the workplace. Its recommendations include mandatory duties on employers to protect employees from harassment and victimisation and uplifts on compensation to be awarded for non-compliance. The EHRC has also suggested that the time limits for bringing complaints in an Employment Tribunal should be increased from three months (from the last act of harassment or last in a series of



such acts) to six months and for time to run, where appropriate, from the exhaustion of any internal complaints procedures. With the UK Government busy with Brexit negotiations, it is difficult to anticipate what steps may be implemented and in what timescale.

Also, again whilst there has no change in the law, the use of non-disclosure agreements (NDAs) has come under scrutiny in the wake of the #MeToo movement particularly as a result of concerns that alleged victims of harassment by Harvey Weinstein had been asked to sign NDAs, with the effect that allegations were suppressed, and the alleged harassment could continue undeterred. Use of NDAs in sexual harassment situations therefore now carries the risk of further adverse publicity and criticism for employers.

The Solicitors Regulation Authority (SRA) issued a warning notice on 12 March 2018 on the use of NDAs with the effect that inappropriate use of NDAs could amount to professional misconduct for lawyers. The SRA are particularly concerned that NDAs are not used in a manner that could result in suppression of complaints to law enforcement agencies. As a result, lawyers are expected to take extra care when advising on NDAs (whether standalone or in a settlement agreement) and to ensure they are not used inappropriately.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT FRENCH COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

Sexual harassment is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Using any form of pressure, which could be one-off, for sexual favors for the harasser or for a third party is deemed to constitute sexual harassment.

## What body of law governs sexual harassment in your jurisdiction?

Both the Criminal Code and the Labor Code are relevant to the issue of sexual harassment. The provisions prohibiting sexual harassment were created by the law n°92-1179 of November 2nd, 1992 relating to sexual abuses in employment. Those provisions were modified by the law n° 2012-954 of August 6th, 2012 relating to sexual harassment and by the law 2014-873 of August 4th, 2014.

The definition and the sanctions relating to sexual harassment are defined by law in the Labor Code (articles L. 1153-1 and following) and in the Criminal Code (art. 222-33).

## What actions constitute sexual harassment?

Case law gives examples of the type of behaviors which could be deemed sexual harassment.

Sexual harassment is defined by taking into account:

- The facts committed;
- Their frequency;
- Their effect on the victim;
- The objective of the harasser.

Examples of unwanted conduct of a sexual nature:

- Suggestive comments about appearance or clothes or asking an employee to wear a dress to show her legs[4];
- Repeated requests for a date with someone who is not interested (gifts, calls, texts…)[5];

[4] Court of Appeal of Reims, Employment Chamber, 19 December 2008, n°06/0186
[5] French Supreme Court, Employment Chamber, 28 January 2014, n°12-20.497 or French Supreme Court, Employment Chamber, 3 March 2009, n°08-02.976

- Standing or sitting too close to someone, following an employee or blocking his or her way[6];
- Sexual, suggestive, insulting or obscene comments even if the victim asked the harasser to stop[7];
- Pressure to obtain sexual favors[8] ;
- A proposal of an employer to an employee who is suffering from sunburn to sleep in his room as he could "relieve her"[9];
- Sexual blackmail during an interview or for the assignment of a promotion.

Sexual harassment at work is not only between an employee and a line manager. It could be between colleagues (not necessarily with a hierarchical link) or between an employee and a client for example (*see the question below about supervisors versus co-workers*).

### Can sexual harassment occur between two members of the same sex?

Yes.

### Are employers required to provide sexual harassment training for their employees?

The employer has a general obligation to protect the physical and mental health of the employees (art. L. 4121-1 of the Labor Code).

The employer has an obligation to prevent sexual harassment and to combat its development within the workplace. This obligation is one of strict liability. The employer has to take all the necessary measures to forestall, avoid and punish any situation of sexual harassment (Article L. 1153-5 of the Labor Code). For this reason, the internal regulations of the company ("*règlement intérieur*") have to mention the provisions relating to sexual and moral harassments.

Preventative measures may include training or information concerning sexual harassment (which can be possibly organized with the participation of the labor inspectorate, the occupational physician or the employee representatives). Such training may address the following issues:

- what constitutes sexual harassment;
- what can be the consequences on people: psychological trauma, impossibility to come back to work…;
- what can be the disciplinary measures: the harasser can be dismissed for gross misconduct without any severance payment;
- the means available to the employee representatives to combat sexual harassment: for example, the "alert procedure": the employee representative can trigger the alert procedure in case of sexual harassment to alert the employer. The employer has to proceed immediately to an

[6] French Supreme Court, Employment Chamber, 14 September 2016, n°15-14.630
[7] French Supreme Court, Employment Chamber, 7 August 2012, n°2012-15
[8] French Supreme Court, Employment Chamber, 18 February 2014, n°12-20.497
[9] French Supreme Court, Employment Chamber, 17 May 2017, n°15-19.300

investigation and to take all the measures to stop the sexual harassment. If the employee representatives and the employer do not agree, the matter is referred to the labor inspectorate;

- how victims can denounce the facts: talk to the occupational physician or to the employee representatives, exercise the alert procedure or the right of withdrawal (if the employee considers that he/she is in danger, he/she can use the right of withdrawal and stop working while the employer takes the necessary measures to stop the conduct);
- role of the occupational physician: listen to the employees and propose measures to the employer, such as the transfer of the victim to another department for example;
- role of the labor inspectorate: the labor inspector can conduct an investigation in the company to check if a situation of sexual harassment exists by collecting statements from the employees. If the labor inspector witnesses a situation of sexual harassment, he/she can oblige the employer to take any measures to stop this situation.

### What are the liabilities and damages for sexual harassment and where do they fall?

The employer must sanction the employee who has committed harassment (Article L1153-6 of the French Labor Code). The exact sanction applied depends on the severity of the harassment, but the sanction could extend to a disciplinary dismissal for gross misconduct with immediate effect.

Employees who are victims of sexual harassment may sue their employer before the Labor Court (civil jurisdiction) and / or before the Criminal Court (criminal jurisdiction).

**As regards civil courts,** pursuant to Article L. 1154-1 of the Labor Code, legal action may be brought by a person who considers himself/herself to be a victim of sexual harassment or discrimination for having suffered or refused to suffer such harassment or for having testified or reported such facts. This person may be an employee, a candidate for employment, an internship or a training period within the company.

Pursuant to Article L. 1154-2 of the Labor Code, the representative trade unions in the company may also take legal action with the consent of the victim employee.

Before the civil court, the employee may claim damages in compensation for his/her losses from the perpetrator, the employer or both. The employee can also take the initiative to terminate his/her employment contract at the fault of the employer.

**In the case of criminal courts**, the action may be brought by any employee or candidate for employment who is the victim of sexual harassment or discrimination related to such acts. Furthermore, any association which has been regularly declared for at least five years at the time of the events and which proposes by its statutes to fight discrimination based on sex, moral or sexual orientation, may exercise the rights recognized to the victim with regard to discrimination committed as a result of sexual harassment. The association is only admissible in its action if it can justify having received the written agreement of the person concerned.

Article L. 222-33 of the Criminal Code punishes sexual harassment with imprisonment of 2 years and a fine of 30,000 euros (this is a maximum).

Those penalties may be increased when harassment is committed:

- By a person who abuses the authority conferred on him/her by his/her functions (employer or hierarchical superior for example);
- On a minor under 15 years old;
- On a person of a particular vulnerability due to age, illness, infirmity or physical or mental disability, pregnancy, apparent or best known by the perpetrator;
- By several persons acting in the quality of author or accomplice.

In those cases, the penalty is increased to 3 years' imprisonment and a fine of 45,000 euros.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The burden of proof is not the same before the civil and criminal courts.

**Before the civil court,** the employee, the candidate for a job, an internship or professional training in the company must present some factual elements suggesting and not necessarily evidencing sexual harassment (some behavior has to be repeated, some other one-off is sufficient). It is then the employer's responsibility to prove that no sexual harassment has been committed.

**Before the criminal courts**, the accused is presumed innocent. The burden of proof rests on the victim/prosecution and the judge decides on the basis of his or her intimate conviction.

In any event, the victim must report elements of the offence, namely repeated sexual comments or behaviour that:

- Either violate the dignity of the victim because of its degrading or humiliating character;
- Either create an intimidating, hostile or offensive situation against him/her.

The decision rendered by the criminal court has civil *res judicata* effect. The civil judge cannot ignore what has been decided by the criminal judge. For example, if the criminal judge dismisses the complaint, the Labor court cannot reach a finding of harassment.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The employer has a specific obligation to protect any worker in the workplace. He must therefore prevent possible sexual harassment, but the law does not specify the quality of persons who may be guilty of sexual harassment. The harasser may therefore be the employer, a superior, a colleague, but also a client or a customer, for example. It is not necessary to demonstrate the existence of a subordinate relationship between the victim and the perpetrator. However, abuse of authority may be regarded as an aggravating circumstance (*see the question above about liabilities and damages*).

### What are the potential defenses employers have against sexual harassment claims?

Given the strict liability obligation to which the employer is bound, its liability is often engaged since the responsibility lies on the employer to take preventive actions to combat the occurrence of acts of sexual

harassment. Case law generally considers that in so far as it is bound by an obligation of strict liability, the employer is liable as soon as an employee is the victim of harassment, even if it has taken measures to put an end to it.

However, more recent decisions on moral harassment have admitted that if the employer manages to demonstrate that it has implemented measures pursuant to articles L. 4121-1 and L. 4121-2 of the Labor Code (risk prevention measures, information and staff training measures, setting up of a more appropriate organization and means, etc.) and that it had taken measures, to put an end to a situation of sexual harassment, as soon as the employer became aware of it, then its liability might not be retained (French Supreme Court, Employment Chamber, *01-06-2016, n° 14-19.702 and* French Supreme Court, Employment Chamber, *5-10-2016 n° 15-20.140*). Even if those decisions constitute an evolution in the Court's appreciation of the employer's liability, the fact remains that the obligation which weighs on the employer is very heavy.

According to the doctrine, those decisions could be applicable to sexual harassment, however, no such ruling has been rendered to date. In defense, the employer can provide evidence for instance that:

- it put in place all preventive measures and acted immediately as soon as he became aware of the harassment;
- the facts do not, in themselves, constitute sexual harassment;
- the facts have nothing to do with the employee's work and therefore with his employer.

### Who qualifies as a supervisor?

In France, the supervisor is someone who has the power to hire, fire, demote, promote, and discipline the employees. However (*see the question about supervisor versus co-worker above*), in France, the subordination link isn't necessary to qualify the sexual harassment. The harasser could be the employer, the supervisor or a coworker. The abuse of authority could only be an aggravating circumstance.

### How can employers protect themselves from sexual harassment claims?

The employer must implement the preventive and information measures provided for, in particular, in articles L. 4121-1 and L. 4121-2 of the Labor Code and recall the provisions on sexual and moral harassment in the internal regulations. He can also work closely with other actors such as the Labor Doctor or the Health, Safety and Working Conditions Committee or the workers representatives to implement:

- employee training;
- an appropriate and effective policy;
- information;
- communication;

to combat harassment and/or to encourage employees to speak out.

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth or related to health problems are unlawful and sanctioned by the Labor Code and the Criminal Code.

Sexual harassment against a pregnant woman is an aggravating circumstance pursuant to Article 222-33 of the Criminal Code (*see the question above about liabilities and damages*).

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The law protects all the employees whatever their gender or sexual orientation.

Discrimination based on gender or sexual orientation is prohibited and sanctioned by the Labor Code and the Criminal Code.

### What is prohibited retaliation?

Article L. 1153-2 of the French Labor Code provides that "*No employee or candidate for recruitment, internship, professional training period in a company, may be sanctioned, dismissed or be the subject of any direct or indirect discriminatory measure, in particular with regard to remuneration, training, reclassification, assignment, qualification, classification, professional promotion, transfer or renewal of contract, for having suffered or refused to suffer sexual harassment*" and Article L. 1153-3 provides that "*No employee may be sanctioned, dismissed or discriminated against for testifying or reporting sexual harassment*".

Any provision or act contrary to those provisions is void.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No. In France, sexual harassment within the meaning of Article L. 1153-1 of French Labor Code is when the facts are suffered by the victim which means that the victim is not consenting. A consenting relationship can't be considered as sexual harassment. However, a consenting relationship can turn into one without consent: in that case, sexual harassment may be established.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

In the event that an employer's employee sexually harasses a third party (customer, supplier, etc.) at work, the employer has to take sanctions against the harasser. If it does not, the harassed third party could claim damages from the employer.

### What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social networks. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especially workplace misconduct, to step forward and take action against their perpetrators.

In France, following the #MeToo movement, the #BalanceTonPorc (meaning "Squeal on your pig") movement has been created and spread all over the social media platforms prompting victims of sexual misconduct at work or in private life to speak out against sexual harassment and to raise awareness of continued tolerance of sexual harassment. The French journalist Sandra Muller (based in New York) has created the #BalanceTonPorc movement on Twitter by denouncing sexual and inappropriate remarks. Following this movement, investigations are underway against some public figures.

### How is the #MeToo movement impacting the law in your jurisdiction?

The "#BalanceTonPorc" movement has had a significant impact on social networks. Opinions are divided in France on this movement which both serves to free the voice of victims but also generates excesses and consequences that can be disastrous on alleged harassers. Social networks have been transformed into Courts, forgetting the principle of the presumption of innocence.

Of course, the movement conveys a message to harassers that victims are no longer afraid to speak out and this message can cause attitudes to sexual harassment to evolve.

Nowadays, sexual harassment has to be judged by the Court. Between 2002 and 2003, the parties had the possibility to do a mediation. This possibility has been removed with the Law n°2003-6 of January 3rd, 2003 as the legislator considered that sexual harassment is too serious and imposed the Court process.

The legislation on harassment has not changed since the movement. However, a bill is under way to punish street harassment, intrusive behavior, insults and sexual intimidation in the public space. The perpetrator may be punished by a fine ranging from 90 to 750 euros - up to 3,000 euros in the event of a repeat offence - in the event of *flagrante delicto*.

This proposed legislation has divided public opinion. Some people argue that this text is indispensable since the repression of sexist and sexual abuse does not exist in the Criminal Code. Other people maintain that this law will be difficult to enforce and therefore will not be effective.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT HUNGARIAN COMPANIES NEED TO KNOW

### What constitutes sexual harassment?

In the Hungarian law, sexual harassment is covered by the general definitions of harassment stipulated by the Act CXXV of 2003 on Equal treatment ("**Equal Treatment Act**") and by the Act C of 2012 on the Criminal Code ("**Criminal Code**").

Pursuant to the Equal Treatment Act, a conduct of sexual or non-sexual nature violating the dignity of a person qualify as harassment if its purpose or effect is to create an intimidating, hostile, degrading, humiliating or offensive environment and it is in connection with the protected characteristic of such person (e.g. sex, sexual orientation, religion, belief etc.).

As opposed to the Equal Treatment Act, the Criminal Code aimed to criminalize harassments more serious in nature. Thus, harassment as a criminal offense occurs if a person engages in conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person arbitrarily, or if a person pesters another person on a regular basis. It can be seen that while an action in its own may constitute harassment under the Equal Treatment Act, the Criminal Code punishes only actions carried out on a regular basis.

### What body of law governs sexual harassment in your jurisdiction?

The Equal Treatment Act and the Criminal Code are the main laws regulating sexual harassment.

### What actions constitute sexual harassment?

Sexual harassment defined in the first question can take verbal, non-verbal or physical forms as well. According to the relevant practice the following actions may constitute sexual harassment:

- Telling or otherwise sharing sexually explicit or demeaning jokes;
- Comments on appearance or dress;
- Use of indecent nicknames;
- Insulting or obscene comments;
- Messages, e-mails or phone calls with sexual or obscene comments;
- Seeking for close physical contacts;
- Displaying sexually explicit magazines or cartoons, or calendars showing individuals in bathing suits or underwear; and
- Posting sexually offensive content on social media sites etc.

### Can sexual harassment occur between two members of the same sex?

Yes, sexual harassment can occur between two members of the same sex.

### Are employers required to provide sexual harassment training for their employees?

There is no specific regulation which would oblige the employers to provide sexual harassment training. However, the employers are required to provide secure, harassment-free working environment, and they are required to protect their employees in case of harassment. Therefore, it is recommended to provide sexual harassment training for the employees.

### What are the liabilities and damages for sexual harassment and where do they fall?

It depends on the type of sexual harassment committed (criminal offence or unlawful act) and the type of the authority conducting the procedure regarding the sexual harassment case.

In case of the infringement of the Equal Treatment Act, the procedure may be initiated against the employer before the Equal Treatment Authority. The authority may order the termination of the injurious situation, restrain the prohibitor from future infringements, it can impose fines and publish its decision.

Employees seeking damages for sexual harassment before civil court, may be entitled to compensation. The amount of the compensation varies widely.

If the harassment qualifies as a criminal offence, as a main rule, the perpetrator shall be punishable by imprisonment not exceeding two years.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must prove that they were subject to sexual harassment which caused disadvantage or there is an imminent danger for suffering disadvantage.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

If the perpetrator is a supervisor who had abused its dominant position, the consequences can be more severe.

### What are the potential defenses employers have against sexual harassment claims?

The employer may dispute that the action violates the dignity of the person or is in connection with the protected characteristic of the person. Moreover, it may show that it did everything within its power, and everything that can be reasonably expected after becoming aware of the sexual harassment. Moreover, the employer should do everything that can be reasonably expected to avoid and prevent sexual harassment.

According to the recommendations of the Equal Treatment Authority, the employer may:

- impose proportionate penalties, in serious cases, terminate the employment of the perpetrator;

- have sexual harassment trainings;
- prepare sexual harassment policies;
- notify the person subject to harassment, that no punishment will be applied against an employee for reporting an incident of sexual harassment or for participating in an investigation;
- record the communication between the parties;
- involve external experts (e.g. mediator) if necessary etc.

### Who qualifies as a supervisor?

The supervisor is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed.

### How can employers protect themselves from sexual harassment claims?

According to the recommendations of the Equal Treatment Authority, the employer may:

- impose proportionate penalties, in serious cases, terminate the employment of the perpetrator;
- have sexual harassment trainings;
- prepare sexual harassment policies;
- notify the person subject to harassment, that no punishment will be applied against an employee for reporting an incident of sexual harassment or for participating in an investigation;
- record the communication between the parties;
- involve external experts (e.g. mediator) if necessary etc.

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under the Equal Treatment Act.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The regulations cover sexual harassments of gay, lesbian, bi-sexual, and transgender persons as well.

### What is prohibited retaliation?

Employers shall not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship cannot be considered as sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes.

### What is the #MeToo movement?

“The #MeToo movement is movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especial workplace misconduct, to step forward and take action against their perpetrators."

### How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement originally started in the U.S. has had an impact on the assessment of sexual harassment issues in Hungary too. As a positive impact of the movement, sexual harassments conducted decades ago were revealed and procedures were initiated. However there have been no changes in regulation on sexual harassments in the Hungarian law.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT INDIAN COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

India recognises that what constitutes sexual harassment at the workplace are acts and behaviors of a sexual nature which are intrinsically linked to any of a range of negative experiences. These range from interference with work to creation of a hostile work environment to implied or explicit promises and threats related to a person's treatment at a workplace i.e. quid pro quo.

The Ministry of Women and Child Development, Government of India (**MOW&CD, GOI**) has succinctly identified five parameters of workplace sexual harassment, viz., sexual, subjective, unwelcome, impact and power.

## What body of law governs sexual harassment in your jurisdiction?

Workplace sexual harassment is governed primarily by the legislation titled The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Act), 2013 (referred to generally as "**POSH"**) and the corresponding Rules of the same year.

In addition, there is a separate specific regulation which governs sexual harassment in higher educational institutions viz. the UGC (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015.

Further, with time to time amendments, the law covering criminal offences viz. Indian Penal Code, 1860 also seeks to protect against sexual harassment by providing for punishment for offences constituting sexual harassment.

## What actions constitute sexual harassment?

Sexual Harassment is constituted of unwelcome acts or behavior (whether directly or by implication) related to implied or explicit promises and threats of preferential or detrimental treatment in either present or future employment and creation of an offensive and health risk environment for women.

Indian laws refer to such unwelcome acts or behavior being any of the following

- physical contact and advances;
- demand or request for sexual favors;
- making sexually colored remarks;
- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

The MOW&CD, GOI goes a step further to elaborate for concerned persons and organizations that the below behaviors would also *inter alia* constitute sexual harassment at the workplace:

- Serious or repeated offensive remarks, such as teasing related to a person's body or appearance.
- Inappropriate questions, suggestions or remarks about a person's sex life.
- Displaying sexist or other offensive pictures, posters, mms, SMS, WhatsApp, or e-mails.
- Invasion of personal space (getting too close for no reason, brushing against or cornering someone).
- Persistently asking someone out, despite being turned down.
- Stalking an individual.
- Controlling a person's reputation by rumour-mongering about her private life.

### Can sexual harassment occur between two members of the same sex?

Neither POSH nor criminal laws envision the same and hence on the face of it same-sex sexual harassment is not covered.

POSH protects women as is evident from its title. Men, as aggrieved party, are not covered within the scope of POSH. The rationale for the law, as set out in the statement of objects and reasons and the preamble, is to ensure a woman enjoys the fundamental rights enshrined in the Constitution of India including the right to equality, right to life, right to live with dignity and practice profession. The background of the law *inter alia* was to promote an enabling working environment for women.

Whether, this woman-centric law covers harassment of one woman employee by another woman is not tested. The statute refers to the person who is accused as a 'respondent' and at a number of places refers to 'him' and 'his'. Additionally, the law prescribes the constitution of the 'Internal Committee' to look into complaints of sexual harassment and implicit in the prescription of the constitution, with a predominance of women members, is the understanding that the victim is a woman and the person accused is a man.

Similarly, the criminal law provisions presume that offences are against women and that the accused is a man – these include stalking, voyeurism and sexual harassment.

The exception to the above general position is the protection expressed in the UGC Regulations.

While the UGC Regulations are similarly titled (i.e. referring to protection of women employees) and not only define an 'aggrieved woman' but also provide for a similar Internal Committee as provided for in POSH, there is recognition of all genders being covered by the UGC Regulations. The definition of 'aggrieved woman' is in fact not used and the reference throughout the regulations is to either "aggrieved person" or an "aggrieved party". Additionally, there is recognition of the respondent/accused person being either a male or a female.

An identified and key responsibility of Higher Educational Institution stipulated in the UGC Regulations is to "***act decisively against all gender-based violence perpetrated against*** *employees and students of* ***all sexes*** *recognising that primarily women employees and students and some male students and*

*students of the third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation".*

Finally, the UGC Regulations recognises vulnerable groups and seeks for supportive measures to be put in place for such vulnerable groups which includes those whose sexual orientations may make more vulnerable.

### Are employers required to provide sexual harassment training for their employees?

POSH prescribes that every employer must organize workshops and awareness programs at regular intervals for sensitizing employees with the provisions of POSH as well as orientation programs for members of the Internal Committee.

Indian judicial precedents have also highlighted the need for organization of workshops to continue with creation of awareness of the vulnerability of women given that men may view sexual conduct in a vacuum without full reference to social setting or underlying threats of violence that a woman may perceive.

### What are the liabilities and damages for sexual harassment and where do they fall?

An 'aggrieved woman' would be entitled to compensation determined by the Internal Committee based on its assessment of the trauma, pain and distress suffered by the victim, loss of career opportunities and medical expenses incurred by the victim be it for physical or psychological suffering. Since the compensation is deducted from the pay of the person held guilty of sexual harassment, the income and financial status of such person is also a determining factor for the Internal Committee in arriving at the sum payable. Such sums can also be recovered from a former employee by legal proceedings.

In addition to compensation payment, the person deemed guilty of sexual harassment could be subject to actions ranging from requiring a written apology to withholding of promotion or pay increment to undergoing counselling sessions or carrying out community service.

Employers/companies' liabilities relate to failure to follow processes for implementation of policies against sexual harassment and could range from approximately USD 735 for the first offence to loss of business license for subsequent ones.

Courts have taken proactive action to curb inaction - in one case punitive damages of approximately USD 247,000 was imposed for failure to constitute Internal Committee and the resultant mental and emotional distress suffered by the aggrieved woman. Reinstatement and payment of back wages have also been ordered in certain cases.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

For a successful claim, a clear complaint supported by evidence including witness account is the key.

The complaint should indicate the improper and/or offensive conduct which was directed at the complainant, that the conduct was at the workplace as described in POSH and the complainant experienced harm. There are guidelines concerning details to be provided in the complaint such as

timelines, description etc. The employee needs to timely file a complaint in writing, preferably within 3 months of the incident.

Since the trained Internal Committee is statutorily equipped with powers of a civil court, including the right to summon witnesses and requiring the production of documents and provision of opportunity to challenge findings, a lucid narrative of the incident by the complainant will be the fundamental factor to prove the account to a judicious Internal Committee and succeed in the claim.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

POSH does not distinguish on the basis of hierarchy although harassment related to promises and threats of preferential or detrimental treatment in employment would likely stem from a supervisor as opposed to a co-worker. Given that POSH aims to protect women from a hostile work environment arising out of a range of conduct, a co-worker could equally be held accountable.

### What are the potential defenses employers have against sexual harassment claims?

Claims under POSH are against the person accused of engaging in sexual harassment. However, employers as organizations have been held responsible for failure to implement POSH and a healthy working environment.

An employer, as an organization or as the management of the organization, can best defend by proactive compliance with POSH. It is for the employer to implement the duties prescribed for employers in letter and spirit without looking for options of narrow compliances for form sake. This proactive compliance could range for real and frequent training and induction of the Internal Committee and employees, treating sexual harassment as a misconduct and not just setting up an Internal Committee but appointing to such committee qualified and truly eligible members aware and experienced in dealing with matters of sexual harassment.

### Who qualifies as a supervisor?

The term used in India is 'employer' which is defined as meaning any person responsible for the management, supervision and control of the workplace. It could include a person or board or committee in charge of formulation and administration of polices of the organization. In a hierarchical chart, it would include any person whose promises and threats related to employment would likely affect an employee.

### How can employers protect themselves from sexual harassment claims?

Response same as the question about defending against claims above i.e. be proactive and real in creating a safe working environment as prescribed by law, principles of natural justice and judicial precedents.

### Does sexual harassment cover harassment because of pregnancy?

It may. Sexual harassment at the workplace includes interference with work and creation of a hostile work environment. It includes unwelcome acts or behavior including any unwelcome verbal conduct of a sexual nature. It is a subjective experience and may be considered objectionable by the pregnant woman. Offensive remarks, such as teasing related to a person's body or appearance are included.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Response same as for the question about harassment between members of the same sex.

### What is prohibited retaliation?

This is not a concept covered under POSH.

However, as a principle of justice, should adverse action be taken by an employer for making a complaint of sexual harassment, the courts would be pro-active in protecting complainants from such action. An adverse action which was seen as founded on the making of the complaint but disguised as an appraisal of work outcome has been set aside and reinstatement and back wages ordered.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

While it is consensual, depending on the facts and change in circumstances from consensual to non-consensual, it may constitute sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes, as definition of workplace is wide and employer's duty comprises a duty to providing a safe working environment which includes safety from persons coming into contact at the workplace.

### How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement is impacting the law by drawing focus to the law for those who are unaware. A vast majority of the discussion concerning the social media campaign time and again draws attention to the existing law. Although evolving from long standing Supreme Court compulsory guidelines, the Indian legislation is in any event quite recent and comprehensive media reports on the #MeToo movement makes employers and employees cognizant of the rights, duties and liabilities attached to prevention, prohibition and redressal of sexual harassment.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT DUTCH COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

Sexual harassment occurs if someone shows verbal, non-verbal or physical behavior with sexual connotation which aims at and results in the affection of the dignity of the other person. This is in particular so if a threatening, hostile, offensive, humiliating or hurting environment is created. No justification for such behavior exists, which means that sexual harassment is not allowed whatsoever. Whether it is considered to be sexual harassment is to a large extent dependent on the answer to the question whether the behavior was unwanted.

## What body of law governs sexual harassment in your jurisdiction?

The prohibition on sexual harassment is included in article 1a Gender Equality Act, an implementation of Directive no. 2002/73/EC. Article 1a of the General Act on Equal Treatment also explicitly includes a prohibition on sexual harassment, an implementation of Directive 2004/113/EC. Apart from that, the prohibition on sexual harassment is laid down in article 7:646 of the Dutch Civil Code.

## What actions constitute sexual harassment?

Sexual harassment can be expressed in a number of different ways. For example, by making suggestive remarks, unnecessarily touching, leering, displaying pornographic images at work, sexual assault and rape, but also sexual blackmail can be at issue, to such an extent that the likelihood of promotion and decisions about the work depend on the rendering of sexual services.

## Can sexual harassment occur between two members of the same sex?

Yes. There is sexual harassment if the behavior has a sexual connotation and the other one is affected in his dignity. This can also occur between two employees of the same sex. The concept harassment must be interpreted objectively. The perception of the victim and the intention of the perpetrator are not a determining factor as to whether or not sexual harassment can be assumed.

## Are employers required to provide sexual harassment training for their employees?

No, there is no requirement to offer training for prevention of sexual harassment. In article 3 paragraph 2 of the Working Conditions Decree, a specific provision is laid down which is directed at the employer, who has the obligation to pursue a policy aimed at the prevention of, and, if this is not possible, at the protection of employees as much as possible against sexual harassment. Offering training to the employees under certain circumstances could be part of the policy that must be pursued by the employer, but a general statutory obligation for the employer to do so is lacking.

### What are the liabilities and damages for sexual harassment and where do they fall?

Should an employee as a result of sexual harassment become unfit for work, the employer must continue to pay 70% of the wages of this employee, in principle over a period of up to 104 weeks. If the employer has failed in his duty of due care towards the employee, as a result of which sexual harassment could occur, then the employee can also claim a compensation from the employer. There can be material as well as non-material damage. Material damage for example can exist of costs incurred by the employee because of psychological help. Under such circumstances there are no fixed amounts granted to the employee as a compensation for immaterial damage he has suffered, but practice has shown that the amount of a compensation - in so far it is paid – is rather low.

If the manner in which the employer has acted can be qualified as seriously imputable, the employee can submit a request to the sub district judge asking to terminate the employment agreement and to grant him a fair compensation. Should the judge do so, then it cannot or hardly be assessed beforehand what the amount of the damages will be, because it is a fairness judgment. The amounts of fair damages that are awarded in practice so far vary from practically nil to € 628,000. - gross.

If an employee commits the offense of sexual harassment, this could be a reason for the employer to terminate the employment. If the employee has acted seriously imputable, this may among other things entail that the employee is not entitled to the statutory severance pay, which amounts to a maximum of € 79,000. - gross or an annual salary.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

If an employee says that he has been sexually harassed, the following applies. The employee must state facts and give evidence, or at any rate give plausible reasons, that can support the presumption of sexual harassment. If the judge cannot conclude from the alleged facts that there is a presumption of distinction, he will reject the claim or the request. But if the judge can conclude from the alleged facts that actually there is such a presumption, the burden of proof will be reversed. It is then the accused person who will have to prove that there was no sexual harassment.

It is dependent on the concrete circumstances of the case which facts must be put forward and which facts must be proven in the event of a defense. It is up to the judge to decide whether certain facts can lead to a presumption of distinction.

If an employee accuses the employer of violation of the duty of due care and wishes to receive a compensation as a result thereof, because the employer did not do enough to prevent and combat sexual harassment, it is up to the employer to show that he complied with the working conditions obligations imposed on him and that he reacted timely and adequately to the harassing behavior and that he took corrective measures. If the facts alleged by the employee give rise to the presumption that the employer violated the obligations imposed on him (pursuant to the Working Conditions Decree), it is up to the employer to prove that he actually acted correctly. Should he fail to do so, it will have been proven that the employer violated the duty of due care.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

No. If an employee wishes to put forward a claim against the perpetrator, the employee must make the same facts plausible and the allocation of the burden of proof is the same, irrespective whether the perpetrator was a colleague or supervisor. If the employee wishes to tackle the employer because of a wrongful act or because of violation of the duty of due care, then in principle there is also no difference between a situation in which a colleague or instead thereof a supervisor was the perpetrator. I can imagine though that it may be assumed that the duty of due care was violated by the employer, if the employer could be identified with the supervisor, for example because the supervisor is director/major shareholder.

### What are the potential defenses employers have against sexual harassment claims?

If a supervisor or employee has committed the offense of sexual behavior, this is always in conflict with the law. There can be no objective justification for sexual harassment. If the employee claims a compensation from the employer, then the employee can base his claim on various grounds: violation of a duty of due care by the employer, acting in contravention to good employership and/or committing a wrongful act.

An employer may put up a defense against the claim based on violation of the duty of due care by arguing that he took all measures necessary to prevent sexual harassment. Other defenses are that the employee did not sustain the damage during the performance of his work (for example because the sexual harassment took place outside of working hours or outside of the work area), that no damage has been sustained or that the damage was significantly caused by a deliberate act or conscious recklessness of the employee himself. In a situation where sexual harassment is at issue, it is hardly conceivable that the latter defense has any chance of succeeding.

Against the claim on account of a wrongful act, the employer can put forward similar arguments. The employer can also defend himself by arguing that there was no increased likelihood of committing a wrongful act (the sexual harassment) because of the instruction the employer gave to the 'perpetrator' (the employee) for carrying out his work – in view of the fact that committing the offense of sexual harassment is entirely distinct from the employee's performance of duties - and/or that the employer under his legal relationship did not have any control over the behavior of the employee that formed the basis for the mistake. The employer can also defend himself by arguing that there is no causal link between the behavior of the perpetrator and the damage that was allegedly sustained.

### Who qualifies as a supervisor?

There is an authority relationship between an employer and an employee if the employer has the power to give instructions with regard to the working discipline. Decisive factor is whether the employer can give instructions to the employee with regard to organizational matters, such as the regularity of the

work and the place where the work must be carried out. It is for instance also relevant whether the employer decides on the holiday arrangements and whether the employer can dismiss the employee.

Sometimes it is laid down in the employment agreement who is the supervisor. More often this is mutually agreed upon between the employer and the supervisor involved and apart from that it also appears from the organizational structure within the organization of the employer. A supervisor is someone to whom the authority has been given to request or instruct the employee to carry out certain tasks. The concept “supervisor” is no legal term.

### How can employers protect themselves from sexual harassment claims?

Pursuant to the Working Conditions Decree, the employer is obligated to conduct a proper working conditions policy, which must contain a policy aimed at the prevention and, if that is not possible, a limitation of psychosocial workload and therefore sexual harassment. This means that the employer must take preventive as well as repressive measures and that he must act against sexual harassment. A preventive measure is drawing up and displaying a policy about sexual harassment, appointing a person of trust, raising awareness, maintaining a complaints handling scheme et cetera. A repressive measure is taking disciplinary measures if an employee, which it is hoped will not occur, commits the offense of sexual harassment, such as reprimanding or, in extreme cases, dismissal.

### Does sexual harassment cover harassment because of pregnancy?

Distinction on the basis of pregnancy, childbirth and motherhood is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Distinction on the basis of heterosexual or homosexual orientation is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

### What is prohibited retaliation?

If an employee submits a claim, the employer must proceed to an investigation. Having an investigation carried out by the employer himself is advised against, because for an employer it is rather difficult to carry out an investigation that is objective and unbiased. Moreover, the outcome will be that the employer must de facto eventually stand on the side of one employee or the other.

If the external investigation shows that there has been sexual harassment, there could be a reason for disciplinary measures or dismissal. It is nonetheless of importance to prevent that the accused is already considered to be the perpetrator before this has been shown by the investigation. Moreover, the employee who reported the sexual harassment may not be put into a disadvantageous position by the employer. The employer must also respect the privacy of the employee and in principle, the data about the report may not be shared with others.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

In the event of a consensual relationship there will generally not be a behavior that aims at or results in the affection of the dignity of the other. Also, the behavior with a sexual connotation will normally be wanted if there is a consensual relationship. Because according to the Supreme Court the answer to the question whether or not there is sexual intimidation is significantly dependent on the desirability or undesirability of the behavior from the part of the 'victim', it will be unlikely that there is sexual harassment in the event of a consensual relationship.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes.

### What is the #MeToo movement?

The #MeToo movement asks attention for men and women who have been sexually harassed and/or face or have faced sexual violence. A lot of victims dare not report this, because they fear not to be believed. For that reason, it was only clear how many men and women faced sexually transgressing behavior. The #MeToo movement is an attempt to alter this and to achieve a reversal.

### How is the #MeToo movement impacting the law in your jurisdiction?

Employers, as well as the government, pay more attention to the prevention and combat of sexually transgressing behavior. In 2018, the Ministry of Social Affairs and Employment pays extra attention to raise awareness under employers with regard to sexual harassment and the importance of a secure working culture, amongst other things, by organizing gatherings. An investigation is also carried out at the instruction of the Ministry of Social Affairs and Employment into the strengthening of the role and position of persons of trust and possibilities are looked at to strengthen the position of the person of trust in practice.

In the field of employment law, the #MeToo movement seems to lead to a more stringent approach where sexual harassment is concerned. However, not all forms of sexual harassments may be subject to the heaviest penalty. Practice shows that judges still judge whether the sanction that is imposed is in accordance with the seriousness of the undesired behavior and that all circumstances of the case must be taken into account, such as the company culture, the manner in which supervisors act and the length of the employment.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT PORTUGUESE COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

Portuguese law foresees two types of harassment:

1. Sexual harassment which is a set of unwanted behaviors perceived as abusive of a physical nature, verbal or non-verbal, with the purpose or effect of gaining advantages, blackmail and even use of force or coercion strategies of the person's will.

2. Psychological harassment which is a set of unwanted behaviors perceived as abusive, practiced persistently and repeatedly aiming to lower self-esteem and ultimately to affect the person's presence at the workplace.

In both cases, victims are involved in situations where they generally have difficulty defending themselves.

## What body of law governs sexual harassment in your jurisdiction?

The Portuguese Constitutions protects sexual harassment by foreseeing equality, dignity and foreseeing the prohibition of discriminatory acts.

In respect to ordinary law, since 2003, the Portuguese Labor Code foresees protection against sexual harassment in the workplace - article 29 (amended in 2009) which is included in the chapter for equality and non-discrimination.

In 2017, Law no. 73/2017, of August 16 reinforced the legislative framework for the prevention of harassment at work.

## What actions constitute sexual harassment?

- Sexual harassment can take many forms, including:
  - Unwanted sexual attention:
    - Invitations for unwanted encounters;
    - Explicit and unwanted proposal of a sexual nature;
    - Unwanted proposals of a sexual nature through e-mail, messages or social networks;
    - Phone calls, letters, messages, e-mail or images of a sexual nature;
    - Intrusive and offensive questions about sex life.
  - Physical contact and sexual assault:
    - Unwanted physical contacts (touching, kissing or attempting kiss);

- Assault or attempted sexual assault.

- Grooming:
  - Requests for sexual favor linked to promises of obtaining employment or improving working conditions.
- Sexual innuendos:
  - Suggestive or offensive comments about body;
  - Suggestive comments about appearance;
  - Jokes or comments of sexual nature.

- Psychological harassment can take many forms, including:
  - Mobbing;
  - Intimidation: systematic threats of dismissal;
  - Personal humiliation: due to physical characteristics.

### Can sexual harassment occur between two members of the same sex?

Yes, there is no difference. What matters is the practice of unwanted behavior regardless of the sex of the perpetrator and the victim.

### Are employers required to provide sexual harassment training for their employees?

Following the entry into force of Law no. 73/2017, of August 16, companies (who have seven or more employees) are obliged to adopt a code of conduct to prevent and to combat harassment in the workplace. However, there is no mandatory training.

### What are the liabilities and damages for sexual harassment and where do they fall?

Sexual harassment is criminally punished and those who practice that crime may be condemned to a prison sentence of 1-2 years (minimum).

The victim of sexual harassment may too act civilly against the perpetrator of sexual harassment by asking for compensation for physical and moral damages.

In terms of labor relationship, employees are entitled to terminate the employment agreement with fair cause which will entitle them to compensation for the termination of the employment contract.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The burden of proof that sexual harassment hasn't occurred is up to the employer. The employee only has to inform the employer that he or she was a victim of sexual harassment and who the perpetrator is, and it is up to the employer to provide evidence that the harassment has not occurred.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

There is no difference in terms of having fair cause to terminate an employment agreement. What is at issue is the unwanted behaviors towards the victim and not who practices it. Although they occupy different positions, they are employees of the same company who must sanction this type of behavior. Nevertheless, the severity of the fault is higher if the perpetrator is a supervisor or a manager.

### What are the potential defenses employers have against sexual harassment claims?

The employer must prove that it has applied the code of conduct in order to prevent and combat sexual harassment and that a disciplinary proceeding against the perpetrator was applied.

### Who qualifies as a supervisor?

A supervisor is the person with the authority and/or management powers to give orders to the employees.

### How can employers protect themselves from sexual harassment claims?

Employers, in order to prevent sexual harassment, should adopt codes of conduct and, if necessary, give specific training to all employees.

### Does sexual harassment cover harassment because of pregnancy?

Sexual harassment and discrimination due to pregnancy are two different figures and both have different legal regimes, however, both can be applicable at the same time to the same person.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Sexual harassment protection is applied regardless of the gender and sexual orientation.

### What is prohibited retaliation?

Employers should not take any kind of retaliation against an employee that reports an incident of sexual harassment or participates in an investigation of a sexual harassment claim.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

If it is a consensual relationship, it is no longer considered sexual harassment, since this figure is characterized by a set of unwanted behaviors.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. One of the employers' obligations is to ensure safety at work and to prevent employees from being placed in dangerous and undesirable situations.

### What is the #MeToo movement?

The #MeToo movement has become a worldwide phenomenon and consists of a movement that deals specifically with sexual violence and it is a framework for how to do the work of ending sexual violence. Although this movement has already been around for years (founded in 2006 by Tarana Burke), it just

started gaining international attention after allegations of sexual assault and harassment by Hollywood producer Harvey Weinstein, in October 2017, began dominating the headlines. This powerful movement has put sexual harassment in the spotlight and has empowered survivors of sexual misconduct to step forward and take action against their perpetrators. The ultimate goal of the movement is to create a cultural transformation.

### How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement had a huge impact worldwide and Portugal was no exception.

In Portugal, there is a civil movement that defends equality between genders named “Capazes” which defends women rights. Is not directly linked to the #MeToo movement, but the basis is the same – protect women from sexual harassment, domestic violence, violation of their rights as women and employees, etc.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT SCOTTISH COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

In the UK, sexual harassment occurs when a person engages in unwanted conduct of a sexual nature. The conduct has the purpose or effect of violating the dignity of another person, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. As the Equality and Human Rights Commission (EHRC) Employment: Statutory Code of Practice points out, the conduct in this context can be any unwanted verbal, non-verbal or physical conduct of a sexual nature.

An employee does not have to have previously objected to a person's conduct for it to be considered unwanted (*Reed v Stedman [1999] IRLR 299 EAT*) and the fact that an employee may have tolerated being harassed over a significant period of time or initiated sexual 'banter' as a coping strategy (*Munchkins Restaurant Ltd and another v Karmazyn & others UKEAT/0359/09*) does not mean that the conduct cannot be unwanted. Furthermore, unwanted conduct does not need to be directed at the person making the complaint, it can be witnessed or overheard, and unwanted conduct can still be considered harassment even if the alleged harasser did not mean for it to be.

## What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is unlawful and is a form of discrimination under Section 26 of the Equality Act 2010. The Equality Act 2010 prohibits an employer and individuals from harassing an extensive category of people including:

- Employees, as defined in the Employment Rights Act 1996;
- Job Applicants;
- Agency Workers;
- Workers who are personally carrying out services for their employer;
- Former Employees, if the harassment arises out of or is closely connected to the employment relationship and if the harassment had occurred during the employment relationship it would have been unlawful;

## What actions constitute sexual harassment?

Unwanted behaviour/conduct of a sexual nature includes:

- unwelcome sexual advances, propositions and demands for sexual favours;
- unwanted or derogatory comments about clothing or appearance;

- leering, staring and suggestive gestures or looks;
- sexual remarks or jokes;
- sexual gestures;
- displaying sexually explicit material, such as pornographic pictures, including those in electronic forms such as computer screen savers or by circulating such material in emails or via social media;
- intrusive questions about a person's private or sex life, and discussing own sex life;
- unwelcome touching, hugging, massaging or kissing;
- sending sexually explicit emails or text messages;
- spreading sexual rumours about a person;
- criminal behavior including sexual assault, stalking, indecent exposure and offensive communications.

### Can sexual harassment occur between two members of the same sex?

Yes.

### Are employers required to provide sexual harassment training for their employees?

On 4th December 2017, the EHRC published guidance for employers on dealing with sexual harassment in the workplace. Employers have a duty of care to protect workers and will be legally liable for sexual harassment in the workplace if they have failed to take reasonable steps to prevent it from happening. There are no minimum requirements employers can depend on to demonstrate that they have taken reasonable steps to protect workers, but all employers are expected to have an anti-harassment policy in place which is monitored and reviewed and an effective procedure for reporting harassment. Effective implementation of an anti-harassment policy includes anti-harassment training for all staff. Furthermore, the EHRC guidance recommends that individuals dealing with complaints of sexual harassment should receive specialist training.

### What are the liabilities and damages for sexual harassment and where do they fall?

A successful claim for sexual harassment in the workplace can expose an employer, and an alleged harasser who has been joined into any proceedings, to an award of unlimited compensation. This would include:

- Compensation for any financial loss, including loss of earnings, suffered as a result of the harassment. The aim is to award a sum of money that will put the claimant into the position he or she would have been in had the wrong not taken place; and
- An award for injury to feelings in line with the guidelines established by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2) (2002) EWCA Civ 1871* which sets out three bands of potential awards:

- The lower band: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence
- The middle band: serious cases, which do not merit an award in the highest band
- The top band: the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award for injury to feelings exceed the top of this band.

The tribunal may also make recommendations aimed at reducing the adverse effect of the harassment on the claimant. The tribunal can also make a declaration as to the rights of the claimant and the employer in relation to the matters to which the proceedings relate.

Regarding compensation, employees remain under a duty to mitigate their losses, usually by looking for a new job if the harassment has resulted in their being out of work, and by limiting their out-of-pocket expenses to those which are reasonably incurred. However, the burden remains on the employer to prove that the employees have failed to mitigate their losses. Where proceedings are brought against an employer and an alleged harasser in respect of the same allegation of harassment and the claimant is successful, the liability for any compensation awarded will be joint and several and accordingly the successful claimant can recover the full amount of any compensation against either of the respondents without the requirement for apportionment.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

As already stated, sexual harassment occurs when A engages in unwanted conduct of a sexual nature. It has the purpose or effect of violating the dignity of B, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Sexual harassment also occurs when A engages in unwanted conduct of a sexual nature. The conduct has the purpose or effect of violating the dignity of B, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them and because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

If the unwanted conduct has the **purpose** of either violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, nothing more is required, and this will amount to harassment. It does not matter whether the conduct had the effect referred to above.

In deciding whether unwanted conduct has the **effect** referred to above (albeit this was not the alleged harasser's purpose), each of the following must be taken into account:

- B's perception.
- The other circumstances of the case.

- Whether it is reasonable for the conduct to have that effect.

In order to bring a successful sexual harassment claim on the basis of unwanted conduct of a sexual nature, the victim must reasonably feel or perceive that their dignity has been violated or an intimidating, hostile, degrading, humiliating or offensive environment has been created. A tribunal will assess whether that individual genuinely held that feeling or belief. Considering reasonableness avoids liability arising where the individual is 'hypersensitive'. If the claimant is prone to taking offence, then even if they did genuinely feel their dignity had been violated there would be no harassment. The concept of the 'hypersensitive' claimant was considered by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal [2009] IRLR 336.* The EAT emphasised that it was important not to encourage the imposition of legal liability in every unfortunate phrase and that violating is a strong word which should not be used lightly.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

An Employer is vicariously liable for any acts of harassment committed by its employees against other employees which occur in the course of employment as per S190(1) of the Equality Act 2010. Additionally, employees have a personal liability in respect of any harassment that they commit. An employer may avoid liability if it can successfully show that it had taken all reasonable steps to prevent the harassment from occurring, as per S109(4) of the Equality Act 2010. It is common practice for claims for sexual harassment to be brought against the employer and the alleged harasser. By doing this the claimant can potentially obtain an additional award but it is also a tactic to put pressure on the employer to settle the claim.

### What are the potential defenses employers have against sexual harassment claims?

To avoid liability for an act of harassment, an employer must show that it had in place all reasonable steps to prevent the harassment before the harassment occurred as per s109(4) of the Equality Act 2010. Acting quickly and reasonably to any allegations of discrimination will not be enough to successfully utilise this defence. In practice, the reasonable steps defence is difficult to establish successfully as the threshold is high.

### Who qualifies as a supervisor?

Supervisor is not a defined term under the Equality Act 2010.

### How can employers protect themselves from sexual harassment claims?

Employers can protect themselves by:

- Having in place appropriate policies which are reviewed regularly to ensure that they are compliant with changes in the law;
- Training employees on the policies, the implications of any breach and ensuring that employees properly understand the information provided to them;
- Training line management on equality and diversity and on how to effectively deal with any complaints that they receive;

- Having effective procedures in place to deal with complaints of harassment;
- A detailed record of who attended training and what the content consisted of;
- Training should be provided to staff regularly.

### Does sexual harassment cover harassment because of pregnancy?

No. Under the general definition of harassment within Section 26 of the Equality Act 2010, A harasses B if A engages in unwanted conduct related to a relevant protected characteristic (rather than of a sexual nature) which has the purpose or effective of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The relevant protected characteristics are age, gender, race, sex, sexual orientation, gender reassignment, religion or belief and disability. For the purposes of harassment, pregnancy and maternity and marriage and civil partnership are not relevant protected characteristics. However, unwanted conduct related to pregnancy and maternity or marriage and civil partnership could amount to sex or sexual orientation harassment. Alternatively, such conduct could amount to pregnancy and maternity discrimination under Section 18 of the Equality Act 2010.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes, The Equality Act 2010 protects individuals from being harassed due to their sexual orientation and gender reassignment.

### What is prohibited retaliation?

Prohibited retaliation is not a defined term in the Equality Act 2010. However, Employers should not take any action against an employee who raises a sexual harassment complaint. Their allegations should be taken seriously and dealt with quickly.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

An employee may succeed in a claim for sexual harassment when a consensual relationship ends, and the other party's conduct becomes unwanted. For example, in *A v Chief Constable of West Midlands Police UKEAT/0313/14* the EAT upheld a tribunal's decision that an employee had been sexually harassed for two days after an 18-month relationship with her work colleague ended.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

The legal position in the UK in relation to harassment by third parties (such as customers or contractors) is complex, as the original provisions relating to third-party harassment as set out in S40 of the Equality Act 2010 were repealed on 1st October 2013. Where an employer fails to act on any complaint of third-party harassment, an employee could argue that this amounts to an unlawful act under s13(1) of the 2010 Act, as the employer's inaction is unwanted conduct which has created an intimidating environment for them. If this argument is unsuccessful in establishing an employer's liability for third party harassment, an employee could claim constructive dismissal on the basis that the failure by their

employer to deal with legitimate concerns regarding third party harassment amounts to a fundamental breach of the implied term of trust and confidence between employer and employee found within the employment contract.

### What is the #MeToo movement?

On 5th October 2017, the New York Times published an article in which substantial allegations of sexual harassment were made against Hollywood producer, Harvey Weinstein. In response to this revelation, actress, Alyssa Milano, suggested that all women who had been sexually assaulted or harassed post #MeToo as a social media status as it would give the world 'a sense of the magnitude of the problem'. The hashtag spread virally and was used 850,000 in the first 48 hours and by November 2017 had been tweeted 2.3 million times in 85 different countries. The aim of the campaign was to raise aware of sexual harassment both within and outwith the workplace and to address power imbalances.

### How is the #MeToo movement impacting the law in your jurisdiction?

On 27th March 2018 the EHRC published a report entitled 'Turning the Tables: Ending Sexual Harassment at Work.' The report makes recommendations to the UK government for legislation to be improved as the current statutory framework does not provide enough protection for victims of harassment.

These recommendations include, but are not limited to, the following:

- A mandatory duty on employers to take reasonable steps to protect workers from harassment in the workplace. A breach of this mandatory duty would constitute an unlawful act for the purposes of the Equality Act, enabling the EHRC to take enforcement action against employers which breach the duty.
- A new statutory code of practice on sexual harassment in the workplace which specifies the steps employers should take to prevent and respond to allegations of sexual harassment.
- Employment tribunals should be given power to apply an uplift of up to 25% to compensation in a successful claim for harassment where there has been a breach of mandatory elements of the code.
- ACAS should develop specific sexual harassment training for managers, workers and sexual harassment 'champions'.
- The Government should develop an online tool which facilitates the reporting of sexual harassment.
- The limitation period for bringing a claim to the tribunal for harassment should be increased from 3 months to 6 months.
- Employers should be required to publish their anti-harassment policy on their external website.

It is not yet clear which of these recommendations the UK government will take forward.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT SLOVAKIAN COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

According to the Slovak law, sexual harassment can be considered as a subtype of harassment as a general term. Both harassment and sexual harassment are considered as discriminatory action and thus constitute the breach of principle of equal treatment.

Slovak Act No. 365/2004 Coll., on Equal Treatment in Certain Areas and on Protection Against Discrimination (the Anti-Discrimination Act) defines sexual harassment as any verbal, non-verbal or physical conduct of sexual nature, the purpose or effect of which is or could be violating the dignity of a person and of creating a hostile, degrading or offensive environment.

## What body of law governs sexual harassment in your jurisdiction?

In general, the sexual harassment is considered as the subject of Slovak civil law.

The general legal framework is governed by the Anti-Discrimination Act. Issues related to labour law and employment are further regulated by Act No. 311/2001 Coll., the Labour Code and Act. 5/2004 Coll., on Employment Services.

## What actions constitute sexual harassment?

In accordance with the Anti-Discrimination Act sexual harassment can take any forms, including any verbal, non-verbal or physical conduct of sexual nature:

- of which purpose is or could be the violation of the dignity of a person and of creation of a hostile, degrading or offensive environment,
- of which effect is or could be the violation of the dignity of a person and of creation of a hostile, degrading or offensive environment.

Examples of such conduct could include:

- Repeated long-term aggressive, sexually-themed remarks that are obviously unwanted by one person;
- Various non-verbal acts (such as pictures of nude women on walls in a predominantly male environment which may create a threatening atmosphere to colleagues in the same workplace);
- Repeated sending of jokes and images with a sexual subtext over the internet against the addressee's will;
- Unpleasant verbal sexual expression, offers, allusions;
- Physical contact (excessive hair stroking, attacks, etc.);

- Enforcing sexual contact, sexual extortion, in extreme cases even rape.

### Can sexual harassment occur between two members of the same sex?

Yes.

### Are employers required to provide sexual harassment training for their employees?

No, there is no specific obligation to provide sexual harassment training for employees. Pursuant to the Slovak Labour Code, employers are just obliged to inform newly hired employees about the general provisions of principle of equal treatment.

Each employer is obliged to ensure equal treatment at the workplace (which includes protection before sexual harassment). However, there is no obligation or general rule on how to proceed in this area.

### What are the liabilities and damages for sexual harassment and where do they fall?

Under the Slovak Labour Code, employers are obliged to ensure the observance of the principle of equal treatment and non-discrimination. If the employer fails to ensure such conditions, it may be fined by Slovak Labour Inspectorate up to EUR 100,000.

Also, the person affected by sexual harassment has the right to claim before the courts that the discrimination (sexual harassment) be stopped, that the consequences of the discriminatory act be remedied and that he/she be provided with adequate satisfaction. In case such satisfaction is not sufficient, the victim also has the right to monetary compensation for non-pecuniary damage.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that he/she has been sexually harassed must show that he or she was subject to unwelcome sexual harassment. If the court deduces the discriminatory behaviour of the defendant, the court will transfer the burden of proof to the defendant.

This means that the defendant (employer) will be required to prove that there has been no discriminatory conduct (sexual harassment) on its part.

If the sexual harassment has a more serious form, it can be considered a criminal offence committed by the harassing person and shall be investigated by the police.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Slovak labour law does not expressly distinguish between sexual harassment from a supervisor or a co-worker.

### What are the potential defences employers have against sexual harassment claims?

As discussed, the employers have the obligation to ensure protection against sexual harassment. Thus, if the employer proves that it took all the measures necessary to avoid sexual harassment, it could potentially be freed from sexual harassment claim or its responsibility could be at least limited.

### Who qualifies as a supervisor?

The Slovak Labour Code defines a supervisor (or managing employees) as those employees who are authorized, at the individual management levels, to determine and impose working tasks on subordinate employees, organize, direct and control their work and give them binding instructions to this end.

As discussed, Slovak labour law does not expressly distinguish between sexual harassment from a supervisor or a co-worker.

### How can employers protect themselves from sexual harassment claims?

An employer needs to have internal measures to avoid sexual harassment and should inform its employees about such measures and ensure they are followed.

### Does sexual harassment cover harassment because of pregnancy?

Harassment because of pregnancy is not specifically considered as sexual harassment, but can still be considered as discriminatory under Slovak Anti-Discrimination Act, e.g. as harassment (general), direct discrimination, etc.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes, both Slovak Anti-Discrimination Act and Labour Code specifically mention the protection based on sexual orientation.

### What is prohibited retaliation?

Anti-Discrimination Act does not allow any any action or omission which has adverse consequences for a person and is directly connected with:

- seeking legal protection against discrimination for oneself or on behalf of another person, or
- testimony, providing an explanation or relates to other involvement of a person in a matter concerning the violation of the principle of equal treatment or,
- complaint/report of the breach of principle of equal treatment.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not prohibited by Slovak law.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

In general, no. However, the employer is always obliged to ensure measures to avoid sexual harassment. Thus, we cannot exclude that an employer would be held liable or co-liable for actions of third parties who are in business contact with its employees if it has not taken necessary and reasonable measures to avoid sexual harassment.

To date, we are not aware about such case law in Slovakia.

### What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms.

### How is the #MeToo movement impacting the law in your jurisdiction?

We are not aware about any direct legal impact of the #MeToo movement on Slovak law. However, we cannot exclude any future impact following to the spread and development of the #MeToo movement.



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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT SOUTH KOREAN COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

Article 2, Paragraph 2 of the Act on the Equal Employment for Both Sexes and Support for Compatibility between Work and Household (the "Equal Employment Act") defines "sexual harassment on the job" as follows:

"An employer, supervisor or co-worker (i) causes another worker to feel humiliation or revulsion through sexual words or actions by utilizing a position within the workplace or in relation to duties[10], or (ii) causes adverse employment consequences on account of refusal to comply with sexual demands or actions."

## What body of law governs sexual harassment in your jurisdiction?

The Equal Employment Act governs workplace sexual harassment in the Republic of Korea.

## What actions constitute sexual harassment?

Any sexual words or actions that would be deemed sufficient to cause someone humiliation or revulsion would constitute sexual harassment. The following non-exhaustive list sets forth a few examples:

- Obscene conversations or sexual comments about a worker's physical appearance that cause the worker to feel sexually humiliated and lose his or her desire to work at the workplace;
- Intentional circulation of rumors pertaining to a worker's sex life causing mental suffering to the worker and preventing the worker from properly performing his or her duties at the workplace; and
- Posting of pornographic pictures or drawings that causes a worker to be sexually humiliated or feel revulsion and prevents the worker from concentrating on his or her work.

## Can sexual harassment occur between two members of the same sex?

Yes.

## Are employers required to provide sexual harassment training for their employees?

Yes. The Equal Employment Act mandates yearly workplace sexual-harassment-prevention training in Korea and requires that the employer make the training materials available and known to employees in an accessible place (Article 13). Further, the Equal Employment Act stipulates that the contents, methods, frequency, etc. of the training are to be prescribed by its Enforcement Decree, which requires that each yearly training session go over the following items:

[10] This could refer to a situation where a supervisor exerts his or her influence using his or her objectively superior rank within the organization, or where a co-worker's remarks or actions, while performing work-related duties, makes the victim feel humiliated or repulsed.

1. Statutes concerning workplace sexual harassment;
2. Applicable procedures and standards in the event of sexual harassment;
3. Counseling and procedures implemented to help victims of workplace sexual harassment; and
4. Other items necessary for prevention of workplace sexual harassment.

The Ministry of Employment and Labor offers an outside instructor, free of charge, to businesses with less than 30 employees in order to facilitate the training. Employers can apply for one via a phone call to the applicable local employment and labor office.

### What are the liabilities and damages for sexual harassment and where do they fall?

Pursuant to Article 12 of the Equal Employment Act, if an employer, supervisor or co-worker commits an act of sexual harassment on the job, he or she may be subject to a fine not exceeding KRW 10 million (USD $9,313, as of June 11, 2018).

Furthermore, under Article 14, Paragraph 1 of the same act, an employer must take disciplinary measures against a violator without delay if the employer confirms that he or she has committed sexual harassment on the job. If the employer fails to take such measures, it may be subject to a fine not exceeding KRW 5 million.

The disciplinary measures taken by the employer may consist of a warning letter, salary reduction, transfer, suspension or dismissal, among others, and should take into consideration the following:

- Degree of sexual harassment;
- Duration of sexual harassment;
- Degree of damages suffered by victim;
- Whether the violator had knowledge that the victim did not welcome the specific act of sexual harassment; and
- Difference in level of positions between the violator and the victim.

The employer shall be punished by imprisonment with labor for not more than three years or by a fine not exceeding KRW 30 million if it dismisses or takes any other adverse measures against a worker who has been victimized by sexual harassment on the job or who has claimed that sexual harassment on the job occurred, in violation of Article 14 (2)[11] (Article 37(2)2).

[11] Article 14-2 (Prevention of Sexual Harassment by Clients, etc.)
(1) Where any person closely related to a worker's duties, such as a client, causes a worker to feel sexually humiliated or repulsed by sexual words, actions, etc. during the performance of his/her duties and such worker requests resolution of the situation, his/her employer shall endeavor to take all possible measures to resolve it, such as changing the place of work and transferring the worker.
(2) No employer shall dismiss, or take any other adverse measures against a worker on account of his/her claim that he/she suffered damage under paragraph (1) or because of disregard for sexual demands from clients, etc.

### What does an employee who believes he/she has been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must show that (1) he or she was subject to sexual words or actions that caused him or her to feel humiliation or revulsion; and the employer, supervisor or co-worker utilized a position within the workplace or in relation to duties **or** (2) the employer, supervisor or co-worker caused adverse employment consequences on account of refusal to comply with sexual demands or actions.

If an employer, supervisor or co-worker abuses or takes advantage of his or her position in the workplace to harass or discriminate against an employee, he or she would be deemed to have utilized his or her position in the workplace. Also, the mere fact that the violator is an employer, supervisor or co-worker of the employee would satisfy this requirement if the victim felt humiliated or repulsed by the actions of any one of the foregoing three in a work environment. However, since it is more common for supervisors to commit sexual harassment on the job using their higher rank, the court may be more inclined to find liability in the case of supervisors (when compared with co-workers).

Further, there is no requirement that the sexual words or actions occur at the workplace itself or during business hours. For example, humiliation caused by sexual words or actions at a company outing or in a car during a business trip would qualify, as they would be considered to be related to the duties of the workplace.

Sexual harassment on the job may also be found if a worker refuses to comply with sexual demands or actions and unilaterally experiences adverse consequences in hiring or employment conditions as a result (e.g., salary reduction, demotion, transfer, suspension, dismissal, etc.). The following non-exhaustive list sets forth a few examples of this:

- Employee is dismissed because the employee refused to abide by the employer's (or supervisor's) request to engage in sexual relations deemed to be made at the workplace;
- Employee is transferred to an unfavorable position or department because the employee resisted the employer's (or supervisor's) groping of the employee's body in a car during a business trip; and
- Employee is not promoted because the employee refused to dance with the employer (or supervisor) at a company party in an intimate and/or indecent manner.

### Is it different if a supervisor versus a co-worker is the perpetrator of the sexual harassment?

Both supervisors and co-workers may be subject to the same liabilities under the Equal Employment Act if they are deemed to have committed sexual harassment on the job. However, as mentioned above, the relevant provision contains the language "utilizing a position within the workplace or in relation to duties." In sexual harassment situations, as it is frequently supervisors that commit the offense using

their superior position within the organization vis-à-vis victim, it is possible for courts to find a supervisor's actions to constitute sexual harassment on the job more easily.

The employer may be held vicariously liable for either a supervisor or co-worker's sexual harassment.

### What are the potential defenses employers have against sexual harassment claims?

Employers may avoid liability by establishing that they took sufficient preventive measures as illustrated by the following chart:

| **Legal Provisions** | **Punishment** | **Remarks (amended or newly enacted)** |
|---|---|---|
| **The employer shall conduct preventive education of sexual harassment on the job every year** (Article 13, Section 1) | Fine of 5 million won | Increase in fine (3 to 5 million won) |
| The employer shall make known to employees **the contents of workplace sexual-harassment-prevention training by posting** or having them available **where employees can freely view** (Article 13, Section 4) | Fine of 5 million won | Newly enacted |
| Anyone may report to the employer upon learning that sexual harassment has occurred (Article 14, Section 1) | - | Newly enacted |
| **The employer must conduct investigation without delay upon learning that sexual harassment has occurred**, and must do so without making the victim, etc. feel humiliation (Article 14, Section 2). | Fine of 5 million won | Newly enacted |
| When sexual harassment in the workplace has been confirmed, **the employer must take appropriate measures upon the victim's request, such as relocating the victim, paid vacation for the victim** (Article 14, Section 4). | Fine of 5 million won | Newly enacted |
| When sexual harassment in the workplace has been confirmed, **the employer must take necessary measures (disciplinary action, etc.) against the perpetrator without delay** in which case **the victim's opinions as to what measures should be taken must be heard** (Article 14, Section 5). | Fine of 5 million won | The latter part newly enacted |
| Specification of adverse measures that may not be taken against the victim, the employee reporting sexual harassment, etc.<br>**1. Dismissal, 2. Disciplinary or other adverse actions, 3. Measures against the employee's wishes/intention (not assigning requested work, etc.), 4. Discriminatory evaluation or payment of wages, 5. Restriction on training opportunities, 6. Ostracism as a group, 7. Other adverse actions (Article 14, Section 6)** | Imprisonment with labor up to 3 years and fine no more than 30 million won | Increase in fine<br>(20→30 million won), Specification of each adverse measure |
| Those who investigated the incidence of sexual harassment, received the report of sexual harassment, participated in the investigation, etc. **shall not disclose confidential information** | Fine of 5 million won | Newly enacted |

| | | |
|---|---|---|
| **they learned during the investigation against the victim's wishes** (Article 14, Section 7) | | |
| **If the employee victimized by a customer, etc. requests resolution of his/her grievance, the employer shall take appropriate measures such as transferring employee to another location, paid vacation during investigation, etc. for the victim** (Article 14-2, Section 1). | Fine of 3 million won | Provision of monetary fine newly enacted<br>("try "→obligation("shall")) |

### Who qualifies as a supervisor?

Court precedent does not specifically define who would qualify as a supervisor under the Equal Employment Act, but it appears to mean not only someone who is in a higher rank but also a person who is in a position to give directions to and monitor the victim in a practical sense.

### How can employers protect themselves from sexual harassment claims?

Employers should hold a mandatory sexual harassment training program every year and make the training materials available and known to employees in an accessible place. In addition, employers must fulfil the following obligations, most of which overlap with the above chart.

1. Obligation to conduct investigation without delay and without making the victim feel humiliation (Amendment Article 14, Section 2).

   If needed, the employer shall relocate the alleged victim, provide a paid vacation to remove the alleged victim during the investigation, etc. (Amendment Article 14, Section 3).

2. Obligation to investigate and if claims appear valid, to take measures against perpetrators (disciplinary action, etc.) without delay (Article 14, Section 1), after hearing what the victim proposes (Amendment Article 14, Section 5).

3. Obligation not to take measures adverse to victim or alleged victim (Article 14, Section 2) and obligation to order relocation, transfer, paid vacation, etc. at the request of the victim, if sexual harassment has been confirmed (Article 14, Section 4).

4. Obligation to protect victim against third party perpetrators (customers, etc.) (Article 14-2, Section 1) and not to take measures adverse to victim for rejecting sexual requests by customers, etc. (Article 14-2, Section 2).

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Articles 7 and 37 of the Equal Employment Act.

1. No employer shall discriminate because of gender in employment, retirement and dismissal of workers, and an employer shall not execute employment agreements designating as grounds for dismissal a female worker's marital status, pregnancy or childbirth (Article 7). If the employer

executes employment agreements designating as grounds for dismissal a female worker's marital status, pregnancy or childbirth, the employer shall be subject to imprisonment with labor of up to 5 years or a fine not exceeding 30 million won (Article 37, Section 1).

2. The employer shall be subject to imprisonment with labor for not more than three years or by a fine not exceeding 30 million won where the employer dismisses, or takes any other adverse measures against a worker because of childcare leave, or dismisses the relevant worker during the period of childcare leave although no ground for discontinuing the employer's business exists; where the employer dismisses or takes other adverse measures against a worker because of the reduction of working hours for a period of childcare; where the employer applies unfavorable working conditions to a worker during the reduction of working hours for a period of childcare because of such reduction of working hours, except for applying them in proportion to the working hours; where the employer dismisses the relevant worker, causes his/her working conditions to worsen, or takes any other adverse measures against him/her because of the family care leave (Article 37, Section 2).
3. Where an employer requests his/her worker, who has reduced his/her working hours for a period of childcare, to work overtime although such worker has not requested such overtime work specifically, the employer shall be punished by a fine not exceeding ten million won (Article 37, Section 3).
4. The employer shall be fined, not exceeding 5 million won, where the employer fails to grant permission for childcare leave after receiving an application therefor, or fails to reinstate his/her worker to do the same work as before the leave, or any other work paying the same level of wages after the completion of a worker's childcare leave; or where the employer fails to reinstate his/her worker to do the same work as before the reduction of working hours for a period of childcare, or any other work paying the same level of wages after the completion of a period of reduced working hours for a period of childcare (Article 27, Section 4).

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

It appears they would also be protected as the law does not contain a provision excluding homosexual persons, etc.

### What is prohibited retaliation?

The Equal Employment Act prohibits "dismissal or other adverse measures" as retaliation against an employee reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim.

According to the amended Article 14, Section 6 of the Equal Employment Act, prohibited adverse measures include:

1. Dismissal;
2. Disciplinary or other adverse action;

3. Measures against the employee's wish/intention (not assigning requested work, etc.);
4. Discriminatory evaluation or payment of wages;
5. Restriction on training opportunities;
6. Ostracism as a group; and
7. Other adverse actions.

In the case of violation of the above provision, the employer shall be punished by imprisonment with labor for not more than three years or by a fine not exceeding 30 million won (Amendment Article 37, Section 2, Paragraph 2). Further, upon confirmation of sexual harassment following investigation, the employer shall, at the request of the victim, relocate, transfer, give him/her paid vacation, etc. (Amendment Article 14, Section 4), or be subject to a fine not exceeding 5 million won.

**Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?**

While not prohibited, a consensual relationship can be considered sexual harassment.

**Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?**

Article 38 of the Equal Employment Act states, "If the representative of a legal entity, or an agent, an employee or any other employed person of the legal entity or an individual commits an offense under Article 37 with respect to affairs of the legal entity or individual, not only shall the offender be punished, but the legal entity or individual shall also be punished by a fine, provided that this provision shall not apply where the legal entity or individual has not neglected to pay due attention and to exercise supervision with respect to the relevant affairs to prevent such offense." Thus, in the case of an agent of the employer violating the Equal Employment Act, the employer may be held liable.

In addition, where any person closely related to a worker's duties, such as a client, causes a worker to feel sexually humiliated or repulsed by sexual words, actions, etc. during the performance of his/her duties and such worker requests resolution of the situation, his/her employer shall endeavor to take all possible measures to resolve it, such as changing the place of work and transferring the worker. (Article 14-2, Section 1).

Also, no employer shall dismiss, or take any other adverse measures against a worker on account of his/her claim that he/she suffered damage under paragraph (1) or because of disregard for sexual demands from clients, etc. (Article 14-2, Section 2). Violation of either provision shall result in a fine not exceeding 5 million won.

It may even be possible to hold the employer liable for wrongful conduct if it fails to take sufficient measures to protect its workers from sexual harassment by a third party.

### What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especial workplace misconduct, to step forward and take action against their perpetrators.

### How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement has had a large impact on the depth of awareness of the issues of sexual harassment in the workplace. Specifically, it has led to the enactment of new laws and amendments imposing stricter obligations and liabilities on employers with respect to sexual harassment in the workplace. Please refer to the chart in the response about potential defenses.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT THAI COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

There are two categories of sexual harassment as specified by the Department of Women's Affairs and Family Development together with Mahidol University, as follows:

1. Quid quo pro; and
2. Hostile work environment

Quid pro quo is one of the most obvious forms of sexual assault by using an exchange of benefits or use of authority to punish the victim in order to get sexual pleasure, such as incest, body contact or any other sexual activities. It is the act by the authority against the lower employee. Even if the victim agrees, it is still considered sexual harassment.

Hostile work environment occurs by creating sexual nuisance in the workplace or creating an antagonistic and undesirable atmosphere. For instance, use of verbal languages such as face and body criticisms, jokes, pornography including sexual orientation, licking, kissing, whistling, holding hands or displaying a pornographic picture/message.

## What body of law governs sexual harassment in your jurisdiction?

In Thailand, the laws which govern sexual harassment are as follows:

- Labor Protection Act B.E. 2541 – Section 16 and 147
    - Section 16 An employer, a person in charge, a supervisor, or a work inspector is forbidden from committing sexual abuse, harassment, or nuisance against an employee.
    - Section 147 Any person who violates Section 16 shall be punished with a fine not exceeding twenty thousand baht.
- Supreme Court Judgment No. 1372/2545: The Plaintiff had the authorization to determine the probation of employment. The Plaintiff persuaded a woman employee who worked under him to enjoy nightlife with him. If such employee did not go, he would reject their passing probation. The Plaintiff intended to commit sexual abuse against such employee under section 16 of the Labor Protection Act. It is a serious charge. The Defendant can terminate the employment of the Plaintiff without paying severance pay to the Plaintiff under section 119(4) of the Labor Protection Act B.E. 2541.
- The Criminal Code – Section 276 to 287/2 regarding sex offense and Section 397

- Section 397: Whoever, to do any act to other person, to annoy, bully, menace, or by any means whatever to be shameful or nuisance, shall be punished with a fine not exceeding five thousand baht.

  If the offence under the first paragraph is committed in public or through any act of sexual deception, it shall be punished with imprisonment not exceeding one month or a fine not exceeding ten thousand baht or both.

- Related law
  - Civil Service Act B.E. 2551 – This Act is applied to government officials.
  - Section 83(8) A civil servant is forbidden from committing sexual abuse or sexual harassment as specified in the Office of the Civil Service Commission rules.
- The Announcement of Labor Relations Commission Re: Minimum standards of employment conditions in state enterprises.
  - Article 10 An employer, a person in charge, a supervisor, or a work inspector is forbidden from committing sexual abuse, harassment, or nuisance against an employee.

### What actions constitute sexual harassment?

According to the Office of the National Economic and Social Development Board, the actions that constitute sexual harassment are as follows:

1. Eye harassment
   a. Stare at the body by sexual means, look under the skirt, stare at the breast, or make the victim feel embarrassed or uncomfortable or the surrounding people feel the same way.
2. Verbal harassment
   a. Criticize shape and body sexually
   b. Force the victim to the private place without her consent and talk/joke about sex
   c. Flirt the victim and talk about porn
3. Physical harassment
   a. Touch the body of the victim, pull her to sit on the lap, kiss and hug the victim without consent, lip licking
4. Other harassment
   a. Display sexual images, objects, and messages including open pornographic images in the workplace, text sex messages, sex images, sex symbols via Line and Facebook
5. Quid pro quo

a. Promise to provide benefits for sex in return such as job title, scholarship, increase of salary, renew a contract by asking for a relationship or asking to do something else sexually

### Can sexual harassment occur between two members of the same sex?

Under the Labor Protection Act B.E. 2541, sexual harassment cannot occur between two members of the same sex. The victims who are protected by the Labor Protection Act B.E. 2541 are only the persons as follows:

1. All women employees; and
2. Young employees (female employees or male employees who are at the age between 15 and not exceeding 18)

In contrast, the law regarding sex offenses (section 276 to 287/2) under the Criminal Code in the division of sex offense, sexual harassment can occur between two members of the same sex. Thus, male employees are also protected under criminal law.

### Are employers required to provide sexual harassment training for their employees?

The requirement to provide sexual harassment training is not specified under the law**.** However, some authorities have provided online sexual harassment training such as the Office of the Civil Service Commission **(**OCSC**).**

### What are the liabilities and damages for sexual harassment and where do they fall?

The liabilities and damages for sexual harassment are in Section 147 of the Labor Protection Act B.E. 2541 which states that any person who violates Section 16 shall be punished with the fine not exceeding twenty thousand baht. Such liabilities and damages fall upon the perpetrators of sexual harassment that are employers or persons in charge or supervisors or work inspectors.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Under the Labor Protection Act B.E. 2541, the female employees have to prove for a successful claim as follows:

1. The perpetrator of sexual harassment is either an employer or a person in charge or a supervisor or a work inspector of her; and
2. Such perpetrator has committed sexual abuse or sexual harassment, or nuisance against her.

According to the Royal Institute Dictionary of Thailand,

- "**Abuse**" means excessive acts to others by molesting which violates custom or ethics.
- "**Harassment**" means showing power by using actions or words in order to frighten the victim.
- "**Nuisance**" means boredom, causing trouble.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Under Labor Protection Act B.E. 2541, it is different. A co-worker who is the perpetrator of the sexual harassment will not be punished by law and he commits no fault under section 16 of Labor Protection Act B.E. 2541. The intention of the law is to punish only the employer, the person in charge, the supervisor and the work inspector who are the perpetrators of the sexual harassment.

Nevertheless, under the Criminal Code, both a supervisor and a co-worker who are the perpetrators of the sexual harassment will be punished.

### What are the potential defenses employers have against sexual harassment claims?

The employers may defend that their actions are not recognized as sexual abuse, harassment, or nuisance against employees in accordance with the definitions of "abuse," "harassment," "nuisance" specified in the response above, or claim that the female employees mutually agreed to engage in sexual activities with them. Besides, the employer may request the evidence and witness of claiming sexual harassment from the employee.

### Who qualifies as a supervisor?

Under the Labor Protection Act B.E. 2541, there are four categories of the perpetrator of sexual harassment as follows:

1. "**Employers**" means all persons who are "employers" as defined in Section 5[12] of the Labor Protection Act which are Employer, a representative of the employer, an authorized employer and an entrepreneur employer under Section 11/1[13];
2. "**Person in charge**" means a chief of all levels including a person in charge;
3. "**Supervisor**" means those who have control over the work done by the employee whether regular or temporary, and no matter what level; and
4. "**Work inspector**" means a person responsible for inspecting the work performed by the employee whether regular or temporary, and no matter what level.

[12] "Employer" means a person who agrees to employ the employee to work and pay wages therefor and shall also include: (1) A person designated to do work for the employer; (2) Where the employer is a juristic entity, the term shall include a person authorised to act on behalf of that juristic entity, and a person designated to act on behalf of the person who is authorised to act on behalf of that juristic entity.

[13] Section 11/1 Where an entrepreneur has authorised an individual to recruit workers, which is not a business of job placement service, and such work is a part of manufacturing process or business operation under the entrepreneur's responsibility, and regardless of whether such individual is the supervisor or takes the responsibility for paying wages to those who perform work, the entrepreneur shall be deemed an employer of such workers. The entrepreneur shall provide labour-contracting employees, who perform the same nature of work as employees under the employment contract, with fair benefits and welfare without discrimination.

### How can employers protect themselves from sexual harassment claims?

Employers can protect themselves by only being involved with the female employees during working hours, keeping some space between the employer and female employees, and not becoming involved with their private matters.

### Does sexual harassment cover harassment because of pregnancy?

Nothing is directly specified about harassment because of pregnancy**.** However, all female employees are protected from sexual harassment in accordance with section 16 of Labor Protection Act B.E. 2541. Thus, a pregnant woman is also protected from sexual harassment.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Under Labor Protection Act B.E. 2541, sexual harassment does not protect gay, lesbian, bi-sexual, and transgender persons as described in the answer about same sex harassment. However, under Criminal Code, it does. Under Section 276 to 287/2 and Section 397 of the Criminal Code, it used the word "whoever" which intends to protect all genders regarding illegal sexual action.

### What is prohibited retaliation?

Female employees shall file a complaint to Department of Women's Affairs and Family Development to begin an action, such as disciplinary punishment, to the employer who is the perpetrator of the sexual harassment. Moreover, the woman shall report to the police regarding the sexual behaviors of the employers or file a plaint to the Criminal Court.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

Yes, it is a type of quid pro quo which specified in the answer to the first question.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

No, it cannot. The employer is only liable for the action of himself.

### What is the #MeToo movement?

The #MeToo movement is an international movement against sexual harassment and assault, which is meant from the phrase "you are not alone" by using the word "MeToo" after a hashtag (#) and posted widely on social networks such as Facebook, Twitter, or Instagram. The purpose of the movement is to help demonstrate the widespread prevalence of sexual harassment and assault, particularly in the workplace. The campaign of #MeToo has being used widespread on social media, including many sites, and the phrase was popularized by Alyssa Milano who encouraged women to tweet about it, especially women who were victims of sexual harassment. As result of the campaign, it was reported by *The New York Time*s, that Harvey Weinstein, who is an American Hollywood producer, was accused by a dozen of women about sexual misconduct. Thus, the #MeToo movement is now the widespread campaign to use as tool against sexual harassment.

### How is the #MeToo movement impacting the law in your jurisdiction?

In Thailand, the #MeToo movement or other campaigns on sexual harassment are not impacted by the law directly because the provisions regarding sexual harassment in the workplace have been already prescribed in the Labor Protection Act B.E. 2541, including other applicable laws such as the Criminal Code, etc. However, the #MeToo movement is widespread on the many social media areas around the world, including Thailand. There are some groups of Thai people who support this campaign by posting the status followed by the "#MeToo" through the social media, not only to stop the sexual harassment and assaults in Thailand, but also to stop sexual harassment and assaults around the world.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MISSOURI COMPANIES NEED TO KNOW

### What constitutes sexual harassment?

In general, Missouri discrimination law now closely resembles Title VII jurisprudence. "There are two types of discriminatory harassment claims: *quid pro quo* and hostile work environment. The former involves the creation of a hostile work environment with threats to alter a term or condition of employment that is carried out. The latter involves the creation of a hostile work environment with threats that are not carried out, or with other severe or pervasive offensive conduct." *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731-32 (Mo. App. W.D. 2014).

### What body of law governs sexual harassment in your jurisdiction?

The Missouri Human Rights Act ("MHRA"), §§ 213.010 through 213.137, R.S.Mo., prohibits employers with 6 or more employees in Missouri from discriminating on the basis of sex. Sexual harassment is considered to be sex-based discrimination under the MHRA. *See, e.g.*, *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731 (Mo. App. W.D. 2014).

### What actions constitute sexual harassment?

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when-

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
- Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

8 C.S.R. § 60-3.040(17)(A).

> "Sexual harassment is defined as any behavior of a sexual nature that is unwelcome and creates a hostile, offensive or intimidating work environment. It includes verbal comments as well as physical touching, as well as 'dirty' pictures or lewd jokes. Situations are analyzed on a case-by-case basis. Another kind of sexual harassment is when a supervisor tries to extort sexual favors for subordinates by threatening adverse actions or promising rewards."

(https://molabor.uservoice.com/knowledgebase/articles/283102-what-is-the-legal-definition-of-sexual-harassment).

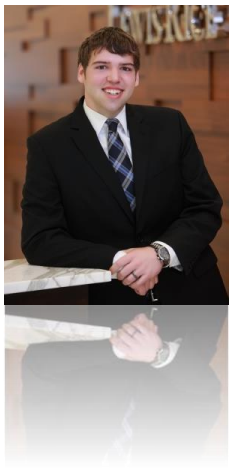
### Can sexual harassment occur between two members of the same sex?

"The Missouri Human Rights Act, like Title VII, prohibits sexual harassment regardless of the sex of the claimant or the harasser. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that sex discrimination consisting of same-sex harassment is actionable under Title VII). In other words, the human rights act protects individuals against sexual harassment, a form of sex discrimination, by members of either the same sex or the opposite sex." *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009).

### Are employers required to provide sexual harassment training for their employees?

Missouri law does not require employers to provide sexual harassment training for their employees. However, it is common and normally recommended that employers provide such training with the aim toward reducing the incidence of sexual harassment. Further, a court, jury, or administrative agency may look more favorably on a defendant-employer who conducts sexual harassment training for employees.

### What are the liabilities and damages for sexual harassment and where do they fall?



Under Missouri law, among the damages an employee can seek for sexual harassment are back pay, front pay, compensatory and punitive damages, and attorney's fees. As recently amended by Senate Bill No. 43 ("SB 43"), effective as of August 2017, the MHRA limits compensatory and punitive damages in the following way:

For employers with 6-100 employees, the limit is $50,000.

For employers with 101-200 employees, the limit is $100,000.

For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $500,000.

§ 213.111.4, R.S.Mo.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

A plaintiff must prove that:

- He was part of a protected class.
- He was subjected to unwelcome harassment.
- His gender was a motivating factor in the harassment (§§ 213.010(2) and 213.101.4, R.S.Mo.).
- The harassment affected a term, condition, or privilege of his employment.
- The employer, if the harassers are the plaintiff's co-workers:
    - knew or should have known about the harassment; and

- did not take prompt and effective remedial action.

*Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 & n.6 (Mo. banc 2009).

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Yes. "An employer is subject to vicarious liability to a victimized employee with respect to sexual harassment by a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command." 8 C.S.R. § 60-3.040(17)(D). "If the alleged harassers are co-workers, the plaintiff must also show that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action." *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 n.6 (Mo. banc 2009).

### What are the potential defenses employers have against sexual harassment claims?

An employer may raise an affirmative defense to liability or damages if "no tangible employment action" is taken by a harassing supervisor. 8 C.S.R. § 60-3.040(17)(D)(1)-(2). A tangible employment action is a significant change in employment status, including: hiring and firing, promotion and failure to promote, demotion, making an undesirable reassignment, making a decision that causes significant changes in benefits, compensation decisions, or work assignments. 8 C.S.R. § 60-3.040(17)(D)(3)-(4).

To establish an affirmative defense, an employer must prove by a preponderance of the evidence that:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The employee unreasonably failed to take advantage of any of the employer's preventive or corrective opportunities or to avoid harm.

*Reed v. McDonald's Corp.*, 363 S.W.3d 134, 142 (Mo. App. E.D. 2012); 8 CSR § 60-3.040(17)(D)(1).

### Who qualifies as a supervisor?

An employer is subject to liability with respect to a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command. 8 C.S.R. § 60-3.040(17)(D). (Note: Following the recent amendments to the MHRA, there is no longer individual liability for supervisors as the definition of employer now expressly excludes an individual employed by an employer. § 213.010(8), R.S.Mo.).

### How can employers protect themselves from sexual harassment claims?

Employers should develop and institute clear, straightforward complaint procedures for employees who believe they are being subjected to, or witness, sexual harassment. Further, employers should present sexual harassment policies in a company handbook or otherwise provide each employee a copy of the employer's sexual harassment policy to make sure employees know how to raise complaints if they wish

to do so. Finally, employers should conduct sexual harassment trainings for employees, including supervisory employees.

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment based on a gender-related trait, such as pregnancy, is unlawful under the MHRA. *See, e.g.*, *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984).

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Under Missouri law, discrimination or harassment on the basis of sexual orientation is not prohibited. *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 485 (Mo. App. W.D. 2015). A case is currently on appeal to the Missouri Supreme Court addressing situations when the MHRA might prohibit discrimination based on sexual orientation. *See Lampley v. Mo. Comm'n on Human Rights*, 2017 WL 4779447 (Mo. App. W.D. Oct. 24, 2017), *reh'g and/or transfer denied* (Nov. 16, 2017), *cause ordered transferred to mo. s. ct.* (Jan. 23, 2018).

### What is prohibited retaliation?

The MHRA prohibits retaliation (generally defined as taking an adverse employment action against an employee) or discrimination against any individual who:

- Opposed a practice prohibited by the MHRA.
- Filed a complaint.
- Testified, assisted, or participated in an investigation, proceeding, or hearing conducted under the MHRA.

§ 213.070.1(2), R.S.Mo.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No. By itself, a consensual relationship between a supervisor and a subordinate is not unlawful. That being said, such a relationship can lead to problematic situations, and a post hoc attempt could be made to use such a relationship as evidence of quid pro quo sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. An employer can be liable for the actions of third parties if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. *See Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 76-77 (Mo. App. W.D. 2015); 8 C.S.R. 60-3.040(17)(C).

### What is the #MeToo movement?

The #MeToo movement, which has grown international in scope, is a wide-ranging campaign to shed light on the prevalence of sexual assault and harassment, especially in the workplace. The movement

became widely known in 2017 in response to a number of high-profile allegations of sexual assault and misconduct against a number of public figures, most notably the filmmaker Harvey Weinstein. The purpose of the hashtag is to empower women and focus attention on male supervisors who engage in sexual misconduct. The #MeToo movement seeks to challenge social norms and change policies and laws surrounding sexual harassment.

### How is the #MeToo movement impacting the law in your jurisdiction?

Missouri has seen a rise in cases wherein the court permits "me too" evidence – testimony from employees other than the plaintiff who allege that they too were subject to the same type of discrimination as the plaintiff – in cases filed under the MHRA. The Missouri Supreme Court has held that, if a plaintiff can show certain facts that suggest that he/she and the "me too" non-party employee are similarly situated, "me too" evidence should be admitted as circumstantial evidence that can support an inference of discrimination in the context of single-act employment discrimination claims. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 117-20 (Mo. banc 2015).

We have seen an uptick in requests for sexual harassment training and general awareness of the complex issues related to sexual discrimination and harassment. It is not clear yet whether the #MeToo movement will result in an increased number of sexual harassment claims, but a rise in such claims is a distinct possibility employers should consider and preemptively address. An apparent consequence of the #MeToo movement and the many stories of sexual harassment that have come to light is that juries may now be more inclined to believe claims of sexual harassment and, therefore, more likely to find against employers.

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# SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: NEW YORK COMPANIES NEED TO KNOW

## What constitutes sexual harassment?

**Epstein Becker & Green (EBG):** United States law has designated sexual harassment into two categories (1) quid quo pro and (2) hostile work environment. Quid pro quo occurs where the employer or agent of the employer grants favors or advantages or makes threats in return for sexual acts. Hostile work environment occurs when the employer or agent of the employer permits or engages in severe or pervasive sexual or sex-based conduct affecting the terms and conditions of the victims' employment.

**Davis & Gilbert (D&G):** Employers must also be mindful of governing laws in their local jurisdictions, such as New York City, which can have more stringent definitions than under federal law.

## What body of law governs sexual harassment in your jurisdiction?

**EBG:** Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating on the basis of sex. In two cases, *Meritor Savings Bank v. Vinson* (1986) and *Harris v. Forklift Systems* (1993), the Supreme Court held that sexual harassment was sex-based discrimination and actionable under Title VII. Sexual harassment law is rooted in Title VII, but has developed through the common law system.

For employers with fewer than 15 employees, state anti-discrimination or harassment law will govern.

## What actions constitute sexual harassment?

**EBG & D&G:** Sexual harassment can take many forms, including:

- Unwelcome sexual advances; requests for sexual favors; and all other verbal and physical conduct of a sexual or otherwise offensive nature, especially where:
    - Submission to such conduct is made explicitly or implicitly a term or condition of employment;
    - Submission to or rejection of such conduct is used as the basis for decisions affecting an individual's employment;
    - Such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.

Examples of such conduct include:

- Telling or otherwise sharing sexually explicit or demeaning jokes or using innuendo;
- Suggestive comments about appearance or dress;
- Suggestive, insulting or obscene comments;

- Repeated requests for a date with someone who is not interested, even in jest;
- Discussion about sexual thoughts, fantasies or activities;
- Leering or catcalls at someone or sexual gestures with hands or body;
- Love letters or phone calls;
- Unwelcome physical touching such as shoulder or arm rubbing or squeezing;
- Standing or sitting too close to someone, following an employee or blocking his or her way;
- Displaying sexually explicit magazines or cartoons, or calendars showing individuals in bathing suits or underwear; and
- Posting sexually offensive content on social media sites.

### Can sexual harassment occur between two members of the same sex?

**EBG**: Yes. A federal court case, *Oncale v. Sundowner* (1998), held that sexual harassment can be perpetrated by members of the same sex, holding that Title VII bars harassment regardless of sexual desire if the harassment is "because of sex."

### Are employers required to provide sexual harassment training for their employees?

**EBG & D&G:** Some states and localities require some form of sexual harassment training for private employers: California, Connecticut, Maine, New York and New York City. Most states do not require such training, but courts of law tend to look favorably on employers who mandate sexual harassment trainings.

### What are the liabilities and damages for sexual harassment and where do they fall?

**EBG**: Employees seeking damages for sexual harassment may be entitled to back pay, front pay, compensatory and punitive damages, and attorney's fees. Contingent on the size of the employer, compensatory and punitive damages are limited under Title VII.

For employers with 15-100 employees, the limit is $50,000.

For employers with 101-200 employees, the limit is $100,000.

For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $300,000.

Damages sought under state and local harassment laws may be significantly higher.

**D&G:** Managers who engage in workplace harassment may also be subject to individual liability under state and local laws. See below the question about the difference between supervisor and co-worker harassment.

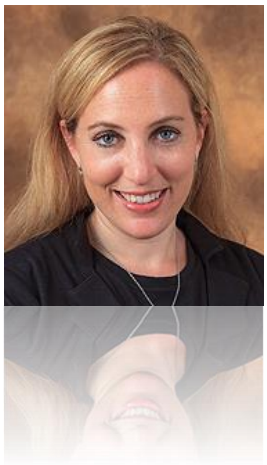
### What does an employee who believes they've been sexually harassed have to prove for a successful claim against the employer?

**EBG & D&G:** Under Title VII, employees who believe that they have been sexually harassed based on the *hostile work environment* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment; (2) the harassment was based on the individual's sex; (3) the sexual harassment was so severe or pervasive that it affected the terms or conditions of employment; and (4) that the employer knew or should have known about the harassment and failed to take prompt remedial action. Employees who believe that they have been sexually harassed based on the *quid pro quo* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment and (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision(s).

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

**EBG**: When an employee alleges sexual harassment against a supervisor, the company is liable for his/her behavior. If the employee alleges sexual harassment against a co-worker, the employee will also have to show that the employer knew or should have known about the harassing conduct and failed to take appropriate remedial action. Certain state and local sexual harassment laws hold individuals personally liable for claims of harassment.

### What are the potential defenses employers have against sexual harassment claims?



**EBG & D&G:** In two federal cases, *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Supreme Court held that employers are always subject to vicarious liability for unlawful harassment by supervisors if the conduct culminates in a tangible employment action. If there is no tangible employment action, the employer may avoid liability by establishing an affirmative defense (the Faragher-Ellerth defense) consisting of the following two elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In cases where the employee is subject to a tangible employment action, the employer may not raise the affirmative defense. For such cases, the employer must produce evidence of a non-discriminatory reason for the tangible employment action, and a determination must be made whether the explanation is pretext designed to hide the discriminatory motive. In some state and local jurisdictions, affirmative defenses may not be available, but the existence of actions taken by the employer to prevent harassment and discrimination, such as conducting regular trainings, can factor into the amount of damages that may be awarded.

### Who qualifies as a supervisor?

**EBG**: In *Vance v. Ball State University* (2013), the Supreme Court held that a supervisor, in cases involving harassment claims, is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed. This explicitly excluded some managers who only have the authority to make or change schedules or direct an employee's daily activities.

### How can employers protect themselves from sexual harassment claims?

**EBG & D&G:** Employers should conduct mandatory sexual harassment training. Employers should provide all employees with a copy of a sexual harassment policy and implement accessible complaint procedures for employees who believe they are being subject to or witness sexual harassment. Per the above, training is now mandated in several states and localities, including California, New York, New York City, Connecticut and Maine.

### Does sexual harassment cover harassment because of pregnancy?

**EBG:** Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Title VII as well as under state and local laws.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

**EBG:** Federal courts are divided on whether harassment on the basis of sexual orientation or gender identity are covered under Title VII's protections against sex-based harassment. Several states and cities expressly prohibit harassment on the basis of sexual orientation and/or gender identity.

### What is prohibited retaliation?

**EBG:** Employers may not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. A claim for retaliation may be made even if the underlying complaint of harassment is unfounded.

### Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

**EBG:** While not prohibited, a consensual relationship can be considered sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

**EBG:** Yes.

### What is the #MeToo movement?

**EBG:** #MeToo was been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment and abuse in the

spotlight and has encouraged survivors of sexual misconduct, including workplace misconduct, to step forward and take action against their alleged harassers.

### How is the #MeToo movement impacting the law in your jurisdiction?

**EBG & D&G:** The #MeToo movement has had a large impact on the depth of awareness of the issues of sexual harassment in the workplace. It remains unclear whether the movement will result in an increased number of sexual harassment claims, but more employers are requiring sexual harassment trainings and are looking for ways to make them more effective.

While there have been no substantive or procedural changes to federal sexual harassment law, the recently enacted tax reform, The Tax Cut and Jobs Act (2017), includes a provision that now expressly denies taxpayers the ability to deduct as a business expense (1) any settlement or payment related to sexual harassment or sexual abuse, or (2) any attorney's fees related to any settlement or payment if such settlement or payment is subject to a nondisclosure agreement. Congress has further mandated that all lawmakers, staff, interns and fellows are required to attend sexual harassment prevention trainings.

Many states and cities have reacted to the #MeToo movement. For example, both New York State and New York City have enacted legislation which requires most private employers to provide sexual harassment training to their workers on an annual basis and also prohibit employers from including confidentiality provisions in settlement agreements involving claims of sexual harassment unless the complaining employee specifically consents.

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